85-1547

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

No. _____

ARKANSAS STATE BOARD OF EDUCATION; WAYNE HARTSFIELD; WALTER TURNBOW; HARRY A. HAINES; JIM DUPREE; DR. HARRY P. McDONALD; ROBERT L. NEWTON; ALICE P. PRESTON; JEFF STARLING; EARLE LOVE ..... *Petitioners*

vs.

LITTLE ROCK SCHOOL DISTRICT, ET AL ..... *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

WHETHER THE EIGHTH CIRCUIT COURT OF APPEALS' IMPOSITION OF FINANCIAL LIABILITY ON THE ARKANSAS STATE BOARD OF EDUCATION IN THE REMEDIAL DECREE FASHIONED BY THAT COURT IS IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND DECISIONS OF OTHER CIRCUITS.

PARTIES

The parties to this proceeding will be the Arkansas State Board of Education and its individual members, Wayne Hartsfield, Walter Turnbow, Harry A. Haines, Jim Dupree, Dr. Harry P. McDonald, Robert L. Newton, Alice P. Preston, Jeff Starling, and Earle Love, petitioners; the Little Rock School District, respondent; and respondents Lorene Joshua, as next friend of minors Leslie Joshua, Stacy Joshua and Mayne Joshua; Rev. Robert Willingham, as next friend of minor Tonya Willingham; Sara Matthews, as next friend of Khayyan Davis, Alexa Armstrong and Karlos Armstrong; Mrs. Alvin Hudson, as next friend of Tatia Hudson; Mrs. Hilton Taylor, as next friend of Parsha Taylor, Hilton Taylor, Jr. and Brian Taylor; Rev. John M. Miles, as next friend of Janice Miles, Derrick Miles; Rev. Robert Willingham, on behalf of and as president of the Little Rock Branch of NAACIP; and Lorene Joshua, on behalf of and as president of the North Little Rock Branch of the NAACIP, were parties to the proceedings in the Eighth Circuit Court of Appeals. Additional parties to the consolidated proceedings in the Court of Appeals appear in the Appendix at pages A-1 through A-3.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. _____

ARKANSAS STATE BOARD OF EDUCATION; WAYNE HARTSFIELD; WALTER TURNBOW; HARRY A. HAINES; JIM DUPREE; DR. HARRY P. MCDONALD; ROBERT L. NEWTON; ALICE P. PRESTON; JEFF STARLING; EARLE LOVE ..... *Petitioners*

vs.

LITTLE ROCK SCHOOL DISTRICT, ET AL ..... *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Arkansas State Board of Education, Wayne Hartsfield, Walter Turnbow, Harry A. Hines, Jim Dupree, Dr. Harry P. McDonald, Robert L. Newton, Alice P. Preston, Jeff Starling and Earle Love, petitioners herein, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Little Rock School District* v. *Pulaski County Special School District No. 1, et al,* 738 F.2d 82 (8th Cir. 1985). The District Court opinions on liability and remedy are reported as *Little Rock School District* v. *Pulaski County Special School District No. 1, et al,* and found at 584 F. Supp. 328 (E.D. Ark. 1984) and 597 F. Supp. 1220 (E.D. Ark. 1984), respectively.

JURISDICTION

The judgment of the Court of Appeals *en banc* was entered on November 7, 1985. A petition for rehearing was not filed. On January 10, 1986, Justice Harry A. Blackmun entered an order extending the time for filing a petition for writ of certiorari in this case to and including March 7, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[No State shall] deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This action was brought seeking consolidation of the Little Rock, North Little Rock, and Pulaski County schools. The Little Rock School District (hereinafter LRSD) is the original claimant to the litigation. The Pulaski County Special School District No. 1 (hereinafter PCSSD), the North Little Rock School District (hereinafter NLRSD), the State Board of Education (hereinafter SBE or State Board) and the Pulaski County Board of Education are defendants. Joshua and Knight intervened following the liability phase of this case.

The District Court, the Honorable Henry Woods presiding, heard the evidence and issued a Memorandum Opinion on April 13, 1984, ruling that segregation in the LRSD, PCSSD and NLRSD had never been erased. Having found violations by the defendant districts resulting in unconstitutional segregative interdistrict effects, an initial remedy hearing was held which ultimately led to an order of consolidation by the District Court.

Petition to Intervene in the remedy phase of this case was filed by the Joshua intervenors and denied by the District Court as untimely. The denial of the Petition to Intervene was heard by the Eighth Circuit Court of Appeals in *Joshua, et al,* v. *Pulaski County Special School District No. 1, et al,* 738 F.2d 445 (8th Cir. 1984).

In its Order granting Joshua's Petition to Intervene, the Eighth Circuit suggested that the District Court reopen the remedy proceedings to hear any and all plans to remedy the unconstitutional violations previously found by the District Court. A hearing to afford the defendant districts that opportunity was held beginning on July 30, 1984. As a result of that hearing the District Court issued a Memorandum

Opinion on November 19, 1984, again ordering consolidation of the defendant districts.

In its April 13, 1984 Memorandum Opinion, the District Court's only reference to the State Board of Education was in the concluding paragraph, stating simply that the State Board was "a necessary party which must be made subject to the Court's remedial order." *Little Rock School District* v. *Pulaski County Special School District No. 1, et al,* 584 F. Supp. 328, 353 (E.D. Ark. 1984).

In its November 19, 1984 Memorandum Opinion following the remedy phase, the District Court, at the request of the plaintiff, entered supplemental findings of fact against the State Board and concluded as a result that the State Board had financial and oversight responsibilities in the court-ordered consolidation. *Little Rock School District* v. *Pulaski County Special School District No. 1, et al,* 597 F. Supp. 1220, 1227-1228 (E.D. Ark. 1984).

The judgment of the District Court was appealed to the Eighth Circuit by the defendant school districts and the State Board of Education (Nos. 85-1078, 1079, and 1081). The cases were consolidated for argument which was heard *en banc* April 29, 1985.

On November 7, 1985, the Eighth Circuit Court of Appeals issued a 64-page majority opinion wherein consolidation of the school districts within Pulaski County was rejected and a detailed remedial decree substituted. Briefly stated, the substituted remedy requires the NLSD to correct its own intradistrict violations, makes substantial boundary changes between the LRSD and the PCSSD, and imposes tremendous responsibility on the State of Arkansas for financing the substituted remedy.

REASON FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE EIGHTH CIRCUIT COURT OF APPEALS' IMPOSITION OF FINANCIAL LIABILITY ON THE ARKANSAS STATE BOARD OF EDUCATION IN THE REMEDIAL DECREE FASHIONED BY THAT COURT IS IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND DECISIONS OF OTHER CIRCUITS.

Discussion must begin with the controlling legal principle laid down by this Court in *Milliken* v. *Bradley*, 418 U. 717 (1974) (Milliken I), to-wit:

> The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann*, 402 U.S. at 16. Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Con-

> versely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.

418 U.S. at 744-45.

The Fourth and Fifth Circuits have interpreted *Milliken I* to require the establishment of a cause/effect relationship vis-á-vis the constitutional violation and a clear delineation of the extent of the effect before an interdistrict remedy is justified. The language of the Fifth Circuit Court of Appeals in this regard is worthy of repeating.

> We believe the Court's deliberate choice of phrases such as "substantial" or "direct cause" and "significant segregative effect" also expresses an insistence that in cases where an interdistrict remedy is requested, there must be clear proof of cause and effect and a careful delineation of the extent of the effect. In the absence of such a showing, school district lines are to be carefully observed and desegregation remedies confined to orders affecting the school district in which the condition of segregation is manifest.

Lee v. *Lee County Board of Education*, 639 F.2d 1243, 1256 (5th Cir. 1981); *Accord Goldsboro City Board of Education* v. *Wayne County Board of Education*, 745 F.2d 324, 332 (4th Cir. 1984).

Nonetheless, in its "Summary of Violations," the Eighth Circuit concludes that:

> The state's actions which originally segregated LRSD and then forestalled its desegregation for over twenty years are not too remote in time to be relevant for this appeal. Rather, the long history of concurrent actions on

> the part of the state, PCSSD, and NLRSD exerted an unmistakable interdistrict effect on the schools of the metropolitan area by singling out LRSD as the school district which provided some educational opportunities for black students and by identifying PCSSD and NLRSD as white districts.
>
> The acts which implicate the state as a primary constitutional violator began long before *Brown*, with a century-old, state-mandated dual school system which provided a markedly inferior education for black students. This dual system was achieved in part through the transfer of black students from NLRSD and PCSSD to LRSD. When the Little Rock Board of Education decided to comply with the Supreme Court's orders and desegregate its schools after *Brown*, the state intervened and prevented the Board from desegregating for nearly twenty years. The state persisted in opposing desegregation for thirteen years after *Brown*, and has only taken minimal actions to assist in the desegregation of its schools to this day.

Appendix at A-45.

The Eighth Circuit review of State actions which allegedly had as their purpose preventing desegregation in the Little Rock School District occupies fourteen pages of the majority opinion. Appendix at A-12-A-25. The review begins in 1867 and extends until the present. Notwithstanding the absence of any cause/effect analysis to establish a connection between the alleged violations and the racial disparity found to exist in Pulaski County, the Court imposed substantial interdistrict relief against the State.

For example, under the remedial decree fashioned by the Eighth Circuit Court of Appeals, the State of Arkansas must

absorb the costs of compensatory and remedial instruction for students who attend racially identifiable schools should such schools, previously approved by the Court in *Clark* v. *Board of Education of Little Rock,* 705 F.2d 265 (8th Cir. 1983), be allowed by the LRSD to continue to exist. Appendix at A-62. No causal explanation for this financial burden is provided by the Court's order.

The Court further imposes large financial responsibility on the State of Arkansas for the construction and operation of a magnet school program. Appendix at A-63. No reference is made to any State constitutional default and resulting current interdistrict effect which would justify this burden.

Least objectionable is the requirement that the State of Arkansas assume the cost of majority-to-minority transfers between the three districts. This aspect of the decree can at least be traced to State actions in the 1950s which resulted in the movement of students across district lines.

On the whole, however, the remedial responsibilities imposed upon the State are in no way based on any specific constitutional violation and resulting effect. In this sense, the judgment of the Eighth Circuit is overbroad as it is not tailored so as to correct the constitutional violations found. *Swann* v. *Board of Education,* 402 U.S. 1 (1972); *General Building Contractors* v. *Pennsylvania,* 458 U.S. 375, 399 (1982). To be in accord with prior rulings of this Court and other circuits, it is submitted that obligations imposed upon the State must be shown to specifically remedy conditions which resulted from specific constitutional violations committed at the state level.

The Arkansas State Board of Education is not unmindful of the obligation of states enunciated by this Court in *Keyes* v. *School District No. 1, Denver Colo.,* 413 U.S. 189 (1973):

> [W]here plaintiffs prove that a current condition of segregated schooling exists within a school district where a dual system was compelled or authorized by statute at the time of our decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (*Brown I*), the State automatically assumes an affirmative duty "to effectuate a transition to a racially nondiscriminatory school system," *Brown* v. *Board of Education*, 349 U.S. 294, 301 (1955) (*Brown II*), see, also, *Green* v. *County School Board*, 391 U.S. 430, 437-438 (1968), that is, to eliminate from the public schools within their school system "all vestiges of state-imposed segregation." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971).

In the instant case, however, no consideration is given to the fact that all three local school districts have been operating under court approved desegregation plans from the 1970s until the present. *Clark* v. *Board of Education of the Little Rock School District*, 426 F.2d 1035 (8th Cir. 1970), *cert. denied*, 402 U.S. 952 (1971); *Zinnamon* v. *Board of Education of Pulaski County Special School District*, No. LR-68-C-154 (W.D. Ark. 1971); *Davis* v. *Board of Education of North Little Rock*, LR-68-C-151 (E.D. Ark. 1977). The situation in Pulaski County is now one of resegregation and not continued segregation.

Similarly, although the Arkansas State Board of Education is attempting to distinguish their responsibilities in the current case from the role of states with centralized school systems, *Milliken* v. *Bradley*, 433 U.S. 267 (1977) (*Milliken II*), it acknowledges that the appropriateness of a state's participation in the remedial phase of an action has been recognized in a variety of settings. *See Brinkman* v. *Gilligan*, 503 F.2d 684, 704 (6th Cir. 1974), *cert. denied*, 429 U.S. 106; and in Michigan, *see Oliver* v. *Michigan State Board of Education*, 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963; *Berry* v. *School Dist. of City of Benton Harbor*, 467 F. Supp. 630 (W.D.

Mich. 2978). *Cf. Reed* v. *Rhodes*, 607 F.2d 714 (6th Cir. 1979).

Yet, the wide-ranging supervisory power attributed to the State Board of Education's statutory authority by the majority opinion has never been interpreted as such by the State Baord itself. Many of the constitutional omissions upon which the liability of the State is based rest solely on these erroneous interpretations of the State Board's authority. *Milliken I, supra*, however, indicates that legal cause cannot result from the omissions of an entity powerless to act.

As the Honorable Richard Arnold asks in his separate opinion, "what is the present legal relevance" of "the manifold sins and omissions of the State of Arkansas" detailed by the majority? Appendix at A-74-A-75. According to *Milliken I* the answer is none. State actions of the past were neutralized by court approved desegregation plans implemented during the 1970s in all three local school districts. The dual-system of education once mandated under Arkansas law was dismantled as *Keyes* required. Blame leveled against the State Board for recent resegregation in Pulaski County has no basis under Arkansas law.

It is well settled that "a federal court is required to tailor the scope of the remedy to fit the nature and extent of the constitutional violation." *Milliken I, supra* at 138. While often articulated, however, this general principle is not always rigorously applied. If a remedy is in fact to be precisely tailored, a federal court must make three discrete but interrelated inquiries: first, what is the content of the right that has been violated; second, what are the effects that have been caused by the violation in question; and, third, what remedial steps are necessary to redress the identified effects.

The need for a careful inquiry does not rest on a formalistic respect for legal niceties. The plain fact is that in

any constitutional case involving a claim for services — be it a school case, or a hospital or prison conditions case — there is necessarily a line at which the appropriate content of a remedy ends and the universal quest for better programs begins. That line may at times be somewhat porous or imprecise, but that consideration only means that more care should be taken in assessing the legitimate dimensions of a remedy. Where the right in question is reasonably precise — e.g., the right to trial counsel, or where the state is the only likely cause of a particular constitutional deprivation, e.g., the lack of sanitary conditions in a state-operated hospital — the remedial inquiry can be more readily kept within definable boundaries. But where the right is indeterminate — e.g., a right to treatment, or where causality is unclear, e.g., regression of hospitalized patients — the potential for judicial overreaching is great.

It is hardly surprising, moreover, that judges would seek to preserve their flexibility with respect to remedial decision-making. A federal court necessarily faces only relatively discrete situations — a school system, a hospital, a prison. These individual situations can always be improved, and, as this Court has reminded, judges "have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable . . ." *Bell* v. *Wolfish*, 441 U.S. 520, 562 (1979). Collectively, these factors exert a not-so-subtle pressure on the courts to err on the side of broad remedial plans.

The problem for the states, however, is that they deal not with a single system or facility, but with many competing claims as well as practical limitations on available resources. For example, the money needed to develop new school programs and buildings in one school district can only come from other school districts, other state programs or new revenues. Since the last option is not infinitely expandable, it is the first two that usually must be looked to. This redistributive

effect of unchecked remedial decision-making tends to take on a life of its own, leading to ever-increasing demands on the states. The requirements embodied in the most demanding decree become the constitutional minimum within (and sometimes even beyond) a particular jurisdiction. In the meantime, those programs that have had their resources depleted in order to fund the requirements of an existing remedy are likely to decline as a result, and thus themselves become ripe for suit. Alternatively, persons who might otherwise use the traditional political processes to seek better services are likely to find that there are few resources remaining and that they too must seek a judicial order to protect their own particular interests.

This is not to suggest that the federal courts should ignore their constitutional responsibilities. If a violation is found, it should be remedied. But that open-ended remedial process must be cabined by assuring religious adherence to the principles set forth earlier: a clear definition of the content of the right; clear findings concerning the causal relationship between the violation and the conditions to be remedied; and relief limited to those acts that are necessary to correct the effects caused by the violation.

When assumptions about the content of rights and the causes of existing conditions become a substitute for thoughtful judicial analysis, the process is almost certain to breed error. And, just as importantly, a court cannot simply assume that state action caused a constitutional violation.

For these reasons, it is imperative that a court make the requisite findings before imposing relief. Otherwise, a state can be held liable for correcting conditions that it neither created nor was in any way responsible for.

To the extent that conditions result from a constitutional

violation, or to the extent that remedial efforts are needed to cure the past effects of an established violation, judicial intervention is appropriate. Absent these considerations, however, a court must stay its remedial hand.

Petitioners reiterate: (1) the imposition of a remedy must be based upon a clear definition of the content of a constitutional right infringed; (2) courts must make a clear finding regarding the causal relationship between a violation found and the conditions to be remedied; and (3) courts must limit the remedy imposed to those efforts which will correct the effects caused by the violation.

The Eighth Circuit Court of Appeals failed to adhere to these requirements while ordering what will certainly be one of the most costly and expensive remedies ever ordered in Arkansas. This is a departure from guidelines promulgated by this Court and other circuits. Further review is necessary to correct this fundamental error in approach.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX I

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 85-1078

Little Rock School District,
Appellee,

v.

Pulaski County Special School District No. 1; Mac Faulkner; Charles Stratton; Don Hindman; Mack McAllister; Sheryl Dunn; David Sain; and Mildred Tatum,
Appellants.

Lorene Joshua, as next friend of minors Leslie Joshua, Stacy Joshua and Mayne Joshua; Rev. Robert Willingham, as next friend of minor Tonya Willingham; Sara Matthews, as next friend of Khayyan Davis, Alexa Armstrong and Karlos Armstrong; Mrs. Alvin Hudson as next friend of Tatia Hudson; Mrs. Hilton Taylor as next friend of Parsha Taylor, Hilton Taylor, Jr. and Brian Taylor; Rev. John M. Miles as next friend of Janice Miles and Derrick Miles; Rev. Robert Willingham on behalf of and as President of the Little Rock Branch of NAACIP; Lorene Joshua on behalf of and as Presi-

Appeals from the United States District Court for the Eastern District of Arkansas.

dent of the North Little Rock Branch of the NAACIP; Katherine Knight, individually and as President of the Little Rock Classroom Teachers Association (LRCTA); LRCTA; Ed Bullington, individually and as President of the Pulaski Association of Classroom Teachers (PACT); PACT; John Harrison, individually and as President of the North Little Rock Classroom Teachers Association (NLRCTA); NLRCTA; Milton Jackson, individually and as a Noncertified Educational Support Employee of the Little Rock School District,

Appellees.

No. 85-1079

Little Rock School District,

Appellee,

v.

North Little Rock School District; Murry Witcher; Ginny Jones; Vicki Stephens; Leon Barnes; Marianne Gossner; and Steve Morley,

Appellants.

Lorene Joshua, as next friend of minors Leslie Joshua, Stacy Joshua and Mayne Joshua; Rev.

Appeals from the United States District Court for the Eastern District of Arkansas.

Robert Willingham, as next friend of minor Tonya Willingham; Sara Matthews, as next friend of Khayyan Davis, Alexa Armstrong and Karlos Armstrong; Mrs. Alvin Hudson as next friend of Tatia Hudson; Mrs. Hilton Taylor as next friend of Parsha Taylor, Hilton Taylor, Jr. and Brian Taylor; Rev. John M. Miles as next friend of Janice Miles and Derrick Miles; Rev. Robert Willingham on behalf of and as President of the Little Rock Branch of NAACIP; Lorene Joshua on behalf of and as President of the North Little Rock Branch of the NAACIP; Katherine Knight, individually and as President of the Little Rock Classroom Teachers Association (LRCTA); LRCTA; Ed Bullington, individually and as President of the Pulaski Association of Classroom Teachers (PACT); PACT; John Harrison, individually and as President of the North Little Rock Classroom Teachers Association (NLRCTA); NLRCTA; Milton Jackson, individually and as a Noncertified Educational Support Employee of the Little Rock School District,

Appellees.

No. 85-1081

Little Rock School District,
Appellee,

v.

Arkansas State Board of Education; Wayne Hartsfield; Walter Turnbow; Harry A. Haines; Jim Dupree; Dr. Harry P. McDonald; Robert L. Newton; Alice L. Preston; Jeff Starling; Earle Love,
Appellants.

Appeals from the United States District Court for the Eastern District of Arkansas.

Lorene Joshua, as next friend of minors Leslie Joshua, Stacy Joshua and Mayne Joshua; Rev. Robert Willingham, as next friend of minor Tonya Willingham; Sara Matthews, as next friend of Khayyan Davis, Alexa Armstrong and Karlos Armstrong; Mrs. Alvin Hudson as next friend of Tatia Hudson; Mrs. Hilton Taylor as next friend of Parsha Taylor, Hilton Taylor, Jr. and Brian Taylor; Rev. John M. Miles as next friend of Janice Miles and Derrick Miles; Rev. Robert Willingham on behalf of and as President of the Little Rock Branch of NAACIP; Lorene Joshua on behalf of and as President of the North Little Rock Branch of the NAACIP; Kather-

ine Knight, individually and as President of the Little Rock Classroom Teachers Association (LRCTA); LRCTA; Ed Bullington, individually and as President of the Pulaski Association of Classroom Teachers (PACT); PACT; John Harrison, individually and as President of the North Little Rock Classroom Teachers Association (NLRCTA); NLRCTA; Milton Jackson, individually and as a Noncertified Educational Support Employee of the Little Rock School District,

Appellees.

Submitted: April 29, 1985
Filed: November 7, 1985

Before LAY, Chief Judge, and HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, and BOWMAN, Circuit Judges, En Banc.

HEANEY, Circuit Judge.

The United States District Court for the Eastern District of Arkansas, after trial, found that the defendants Pulaski County Special School District (PCSSD), the North Little Rock School District (NLRSD) and the Board of Education of the State of Arkansas (State Board) contributed to the continuing segregation of the Little Rock schools, and that an interdistrict remedy was appropriate. The district court ordered consolidation of the three school districts, establishment of a uniform millage rate, elimination of discriminatory practices, and creation of magnet schools to enhance educational opportunities in the new district. It held that the State Board had remedial, financial and oversight responsibilities that would be detailed at a later date. The defendants appeal from the district court's order. In addition, the Joshua intervenors, representing black parents and students, filed a brief in support of the district court's judgment, and the United States filed an amicus curiae brief in general support of the appellants.

We hold that the district court's findings on liability are not clearly erroneous and that intra- and interdistrict relief is appropriate. We find, however, that the violations can be remedied by less intrusive measures than consolidation. These measures, most of which were suggested by the defendant school districts or the Joshua intervenors, include authorizing the district court to make limited adjustments, after a hearing, to the boundaries between Little Rock School

District (LRSD) and PCSSD, correcting the segregative practices within each of the individual school districts, improving the quality of any remaining nonintegrated schools in LRSD, providing compensatory and remedial programs for black children in all three school districts, authorizing the district court to establish, after a hearing, a limited number of magnet schools and programs open to all students in Pulaski County, and requiring the State Board to participate in funding the compensatory, remedial and quality education programs, in establishing and maintaining the magnet schools, and in monitoring plan progress. We remand to the district court for action consistent with this opinion.

I. BACKGROUND AND PROCEDURAL HISTORY.

Pulaski County is the most heavily populated metropolitan area in Arkansas, encompassing three independent school districts: LRSD, NLRSD, and PCSSD. The LRSD covers fifty-three square miles and comprises about sixty percent of the City of Little Rock. Although the population of the City of Little Rock is approximately two-thirds white, in the 1983-84 school year, 70% of LRSD's 19,052 students were black. Along with NLRSD, LRSD is one of the oldest continuously operating school districts in Arkansas. The NLRSD covers twenty-six square miles and comprises nearly all of the City of North Little Rock. Its 1983-84 student population was 9,051 (36% black, 64% white). The PCSSD surrounds LRSD and NLRSD. Created in 1927 through the consolidation of thirty-eight rural independent school districts, it covers 755 square miles and contains the remainder of the county not included in the other two school districts. In 1983-84, it had 27,839 students (22% black, 78% white). Each of the three districts currently operates under a court-ordered desegregation decree, and none of the districts has achieved unitary status.

On November 30, 1982, LRSD filed this action against PCSSD, NLRSD, the State of Arkansas, and the State

Board.[1] On April 13, 1983, the district court dismissed the claim against the State of Arkansas but refused to take similar action concerning the State Board, holding that the Board is a proper party in light of its general supervisory relationship with the individual school districts, and the allegations that it has carried out its duties in a manner which increased segregation in Little Rock. The district court concluded that the dismissal of the State of Arkansas had no practical effect on the disposition of the lawsuit. *Little Rock School District* v. *Pulaski County Special School District*, 560 F. Supp. 876, 878 (E.D. Ark. 1983). The district court separated the liability and remedy phases of the litigation and held liability hearings from January 3-13, 1984.

On April 13, 1984, the district court issued its decision on liability, finding that PCSSD and NLRSD had failed to establish unitary, integrated school districts and had committed unconstitutional and racially discriminatory acts which resulted in "significant and substantial interdistrict segregation." *Little Rock School District* v. *Pulaski County Special School District*, 584 F. Supp. 328, 351-53 (E.D. Ark. 1984). It concluded that these two school districts had taken actions which had substantial interdistrict segregative effects on education in each of the school districts in the county, and that the districts had failed to redress these segregative effects which they had perpetuated for over a century. The district court also reiterated its holding that the State Board was a "necessary party who must be made subject to the Court's remedial order." 584 F. Supp. at 352-53. It concluded that the only long- or short-term solution to

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[1] LRSD also named as defendants the Pulaski County Board of Education and the individuals serving on each of the defendant boards of education. The Pulaski County Board of Education did not participate in this litigation. The district court states, however, that the County Board has a remedial responsibility that has yet to be defined.

On September 29, 1983, the district court denied Little Rock's motion to add the Governor, State Treasurer and State Auditor as defendants.

these interdistrict violations is consolidation, and it scheduled hearings to consider the precise means to accomplish that end.

The first remedial hearings took place from April 30 through May 5, 1984. Before these hearings were held, a group of black parents in Little Rock, the Joshua intervenors, sought unsuccessfully to intervene in the proceedings.[2] They appealed, and on May 23, 1984, this Court ordered the district court to allow them to intervene and directed it to hear evidence from them concerning remedial alternatives to consolidation. Meanwhile, the defendant school districts had also appealed from the district court's order finding interdistrict violations and ordering consolidation of the three school districts. On May 23, 1984, we dismissed that appeal as premature but suggested that the district court reopen the proceedings to permit PCSSD and NLRSD to advance remedial alternatives to consolidation. *Little Rock School District* v. *Joshua*, No. 84-1543 (8th Cir. May 23, 1984) (order); *Little Rock School District* v. *Pulaski County Special School District*, Nos. 84-1620, 84-1621 (8th Cir. May 23, 1984) (order).

The district court held further remedial hearings from July 30 through August 2, 1984, and heard evidence on alternative remedial plans submitted by PCSSD, NLRSD, and the Joshua intervenors.[3] On November 19, 1984, it issued its decision on the remedy, reaffirming its view that consolidation of the three school districts was necessary to remedy the constitutional violations. It also entered further findings concerning the State Board's liability and reaffirmed

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[2]The district court had denied an earlier motion by Joshua to intervene on January 3, 1984.

[3]The district court also heard from the McKnight intervenors, representing the teachers employed in the three districts. *Little Rock School District* v. *Pulaski County Special School District*, 597 F. Supp. 1220, 1227 (E.D. Ark. 1984); *see also Little Rock School District* v. *Pulaski County Special School District*, 738 F.2d 82, 85 (8th Cir. 1984) (allowing intervention by teacher representatives).

the State Board's remedial responsibilities. 597 F. Supp. at 1227-28. The district court subsequently denied motions by the defendants for reconsideration.

This appeal followed. The issues on appeal are: (1) whether the district court's findings of interdistrict violations are clearly erroneous; (2) whether the district court's remedy exceeds the scope of the constitutional violations; and (3) whether the proceedings before the district court deprived the State Board and PCSSD of due process.

II. THE DISTRICT COURT'S FINDINGS OF INTERDISTRICT VIOLATIONS ARE NOT CLEARLY ERRONEOUS.

A. Legal Background.

1. Legal Standards in Desegregation Cases.

Thirty years ago, the Supreme Court decided in *Brown* v. *Board of Education*, 347 U.S. 483 (1954) that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." *Id.* at 495. Since *Brown*, the Supreme Court has affirmed the obligation of school authorities operating segregated schools "to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Raney* v. *Board of Education*, 391 U.S. 443, 446 (1968); *Green* v. *County School Board*, 391 U.S. 430, 437-38 (1968). Moreover, the Supreme Court has held that "[e]ach instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment." *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 459 (1979); *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 413-14 (1977) *(Dayton II)*.

Before a court may impose an interdistrict desegregation remedy, it must find an interdistrict constitutional violation. In *Milliken I*, the Supreme Court explained this prerequisite:

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by

> imposing a cross-district remedy, it must be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state *or* local school districts, or of a single school district have been a substantial cause of interdistrict segregation.

Milliken I, 418 U.S. at 744-45 (emphasis added).

As with any fourteenth amendment violation, a discriminatory purpose must be shown. *Washington* v. *Davis*, 426 U.S. 229 (1976); *Arlington Heights* v. *Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977); *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973). Although the discriminatory impact of state action does not in itself prove a constitutional violation, the "[a]dherence to a particular policy or practice, 'with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn.' " *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 465 (1979).

Although an evaluation of basic segregative effects is important in determining the scope of a violation and hence the permissible scope of the remedy, a reviewing court is not called upon to quantify the precise segregative effects of each individual act of discrimination. *Dayton Board of Education* v. *Brinkman*, 443 U.S. 527, 540 (1979) (Dayton iI).

This Court has affirmed findings of interdistrict violations and has approved interdistrict desegregation remedies on several occasions. *See, e.g., Morrilton School District No. 32* v. *United States*, 606 F.2d 222, 229 (8th Cir. 1979); *United States* v. *State of Missouri*, 515 F.2d 1365, 1371 (8th Cir. 1975); *Haney* v. *County Board of Education of Sevier County*, 429 F.2d 364 (8th Cir. 1970). We have also required a state (that had been found to have committed intradistrict violations) to participate in an

intradistrict remedy even though that remedy required the state to expend funds in school districts other than the violating district. *Liddell* v. *State of Missouri*, 731 F.2d 1294 (8th Cir.), *cert. denied*, ___ U.S. ___, 105 S. Ct. 82 (1984).

2. Review of Factual Findings.

We will not reverse the district court's factual findings with respect to liability unless we conclude that they are clearly erroneous. Fed. R. Civ. P. 52(a); *Anderson* v. *City of Bessemer City*, 105 S. Ct. 1504 (1985); *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287-90 (1982); *Dayton II*, 443 U.S. at 534 n.8; *Columbus Board of Education* v. *Penick*, 443 U.S. at 468-71 (concurring opinions of Burger, C.J., and Stewart, J.); *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1978). Nor will we reverse such findings when they are based on inferences from other facts unless the rigorous standards of the same rule are met. *Anderson*, 105 S. Ct. at 1511. The Supreme Court has emphasized the importance of the clearly erroneous rule in civil rights cases, *see, e.g.*, *Pullman-Standard* v. *Swint*, 456 U.S. at 287-90, and, more particularly, in school desegregation cases:

> The elimination of the more conspicuous forms of governmentally ordained racial segregation . . . counsels undiminished deference to the factual adjudications of the federal trial judges in cases such as these, uniquely situated as those judges are to appraise the societal forces at work in the communities where they sit.

Columbus, 443 U.S. at 470 (Justice Stewart, with whom Chief Justice Burger joins, concurring).

B. The State's Role in the Segregation of the Three Pulaski County School Districts.

The district court detailed the history of state-imposed segregation in the public schools in the State of Arkansas

and the steps taken by the state[4] to perpetuate a dual school system, particularly in LRSD. The court pointed out that,

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[4] In finding that the State Board of Education was the proper agency through which the state was responsible in creating and failing to disestablish the dual school systems in Pulaski County, the district court noted:

> The State Board of Education has, by statute, general supervision over all public schools in the State of Arkansas. Ark. Stat. Ann. § 80-113. In addition to that general responsibility, the State Board and the Department of Education have numerous specific duties, including the approval of plans and expenditures of public school funds for new school buildings (Ark. Stat. Ann. §§ 80-113, 80-3506; T. 775); review, approval and disapproval of local school district budgets (Ark. Stat. Ann. §§ 80-113, 80-1305; T. 773); administration of all federal funds for education (Ark. Stat. Ann. §§ 80-123, 80-140); disbursement of State Transportation Aid Funds to local school districts (Ark. Stat. Ann. §§ 80-735, 80-736); *assisting school districts in the operation of their transportation system (T. 774); lending funds from the State Revolving Loan Fund to local school districts (Ark. Stat. Ann. § 80-942); approval or disapproval of bonds issued by local school districts (Ark. Stat. Ann. § 80-1105; T. 775); advising school districts regarding the issuance of bonds (T. 777); and regulation of the operation of school buses (Ark. Stat. Ann. §§ 80-1809, 80-1809.2).*
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> The State Board of Education has broad statutory authority to supervise the public schools of the state generally, and to take what action it may deem necessary to "promote the physical welfare of school children and promote the organization and increase the efficiency of the public schools of the State." Ark. Stat. Ann. § 80-113.
>
> The State Board of Education has the authority to promulgate regulations concerning the earmarking and use of funds used by local school districts (Ark. Stat. Ann. § 80-1305), the use of federal education funds by local school districts (Ark. Stat. Ann. § 80-142) for the administration of State Transportation Aid Funds by local school districts (Ark. Stat. Ann. § 80-735), and for the operation of

(footnote continued on next page)

despite the state's role in mandating and maintaining the dual system until the mid-1960's, the state had done nothing to assist in dismantling the dual system. The court further found that the state's acts had an interdistrict segregative effect with respect to the three school districts in Pulaski County. These findings are not clearly erroneous.

The state's role in the segregation of the public schools of Arkansas began in 1867 when the legislature enacted a law requiring separate public schools for blacks. Act of Feb. 6, 1867, No. 35, § 5, 1866-1867 Ark. Acts 98, 100. In 1931, this legislation was superseded by a law which required the board of school directors in each district of the state to "establish separate schools for white and colored persons."

(footnote continued from preceding page)

school buses by local districts (Ark. Stat. Ann. §§ 80-1809, 80-1810).

The State Board of Education may lend funds from the State Revolving Loan Fund for the purchase of school buses and other equipment, for making major repairs and constructing additions to school buildings, for the purchase of sites for new school buildings, for the construction of new school buildings, and for the purchase of surplus buildings. Ark. Stat. Ann. § 80-942.

597 F. Supp. at 1227-28 (emphasis included).

The State Board does not contest these findings. Rather, it argues: first, that the district court's decision imposes financial burdens on the Board without finding that such expenditures are required to redress the effects of the Board's constitutional violations; second, that the Board was denied procedural due process by the district court; third, that the district court's findings failed to establish any causal relationship between violations found and the conditions to be remedied; and fourth, the district court's remedial order exceeds the limits necessary to correct the effects of the violations. In any event, we find no error in the district court's imposition of remedial responsibilities on the state through the State Board. *See Evans* v. *Buchanan*, 393 F. Supp. 428 (D.C Del.) (three-judge panel), *aff'd*, 423 U.S 963 (1975).

Ark. Stat. Ann. § 80-509(c) (Repl. 1980). This statute was repealed on November 1, 1983.

Even though the United States Constitution required that the black and white public schools be equal, *Cumming* v. *Richmond County Board of Education*, 175 U.S. 528 (1899); *see also Plessy* v. *Ferguson*, 163 U.S. 537 (1896), black public schools in Arkansas were inferior to white schools. What was true throughout the state was true for NLRSD and PCSSD. Expenditures per pupil for black children in elementary schools in these districts were substantially less than they were for white children, the salaries of black teachers in the black schools were substantially lower than they were for the white teachers in the white schools, and the illiteracy rate of black children was substantially higher than that of white children. Of particular importance in this case, the black elementary schools in these two districts were inferior to the black elementary schools in LRSD. 584 F. Supp. at 330.

The disparities at the high school level were even more pronounced than at the elementary level. Historically, LRSD maintained a high school for black students that was fully accredited by the North Central Association. *Id.* As late as the mid-1950's, however, no similar facility was maintained by PCSSD. *Id.* PCSSD paid the tuition and transportation costs for numerous black students who traveled from PCSSD to attend school in LRSD. 584 F. Supp. at 330. The district court credited several studies and the testimony of several witnesses to the effect that LRSD was identified as the school district in the state which provided educational opportunities for black students. *Id.* This identification tended to draw black students to LRSD from all over the state, and particularly from Pulaski County.[5] The state was fully aware of these disparities. Indeed, it had commissioned studies documenting that the disparities existed, and that the disparities were prominent

[5] Other factors encouraging migration of blacks to LRSD were jobs and public housing. 584 F. Supp. at 345. As pointed out elsewhere in this opinion, no public housing has been constructed in PCSSD, and housing and credit restrictions prevented blacks from buying or renting housing in much of that district.

among the factors that drew black families to Little Rock from the county and the rest of the state.

> It cannot be seriously denied that the Little Rock School District's maintenance of the only North Central accredited black high school in the County and indeed in the entire area led to a concentration of blacks in this district. For almost half a century it has not only assumed the burden of giving a quality education to blacks in the County and from far corners of the State but has also been the object of racially motivated attacks by certain political and cultural groups.

584 F. Supp. 330.[6]

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[6]LRSD introduced into evidence a study which made the following conclusion:

> In sum, black students from Pulaski County crossed the district boundary to attend senior high in Little Rock from the 1920s to the 1960s. They probably became numerous in the early 1930s when Paul Laurance Dunbar High School acted as a magnet for county students who had little opportunity to attend senior high in their own district. At some point, the two districts worked out a tuition agreement under which Pulaski County paid for the use of Little Rock facilities by individual students. This led to a "county" designation on student record cards, the incidence of which shows that a substantial number of county students were enrolled in at Dunbar in the 1940s and 1950s. Students from the county continued to attend Little Rock into the 1960s, but their numbers decreased as the county began to provide more and better senior high schools.

J.D.R. at 915-21.

This movement of blacks into LRSD, which the district court found to be "consistently understated" as shown in PX 36, 584 F. Supp at 346, is reflected in general population statistics. From 1950 to 1980, the black population of the City of Little Rock more than doubled, from approximately 23,000 to more than 51,000. During the same period, the white population of the City of Little Rock, excluding annexed territory, declined.

(footnote continued on next page)

In 1953, when the Granite Mountain housing project for blacks was being planned, the state, at the behest of the affected school districts enacted legislation authorizing the transfer of the project site from PCSSD to LRSD. This action insured that a major black housing project would be built in LRSD, and that LRSD would continue to be recognized as the school district in Pulaski County which educated black children. This housing project is discussed more fully *infra*.

Notwithstanding the state's awareness of the educational disparities between LRSD and the other school districts in the state, it took no remedial action to require adequate educational opportunities for blacks in school districts other than LRSD.[7] In summarizing the pre-*Brown* history of school segregation in Pulaski County, the district court found that, historically, "[a]s far as the education of blacks was concerned, school district boundaries in Pulaski County were ignored." 584 F. Supp. at 330.

Even after the Supreme Court's decisions in *Brown I* and *Brown II*, the State of Arkansas took no steps to dismantle the segregated school system in Arkansas or to improve the quality of the black schools in the state generally or in the defendant school districts in particular. To the contrary, it

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If the annexed territory is included, the white population increased from 79,000 to 105,000. *See* BUREAU OF THE CENSUS, 1950 CENSUS OF POPULATION, CHARACTERISTICS OF THE POPULATION, vol. 11, part 4; BUREAU OF THE CENSUS, 1980 CENSUS OF POPULATION, CHARACTERISTICS OF THE POPULATION, vol. 1. For related population statistics, *see* note 8 *infra*.

[7] Indeed, the State Board successfully argued in a federal district court case in 1949 that black students did not have the right to attend high school within their school districts and that "the interests of Negro education will be best promoted by the maintenance of a consolidated Negro high school serving several districts[.]" *Pitts* v. *Board of Trustees of DeWitt Special School District*, 84 F. Supp. 975, 987 (E.D. Ark. 1949).

took a series of actions which delayed the elimination of the dual school system in the state for years. These actions were primarily directed against LRSD and heightened the identity of that district as the "black" district of Pulaski County.

On May 20, 1954, three days after *Brown I*, the Board of Education announced that "[i]t is our responsibility to comply with federal constitutional requirements and we intend to do so when the Supreme Court of the United States outlines the method to be followed." *Cooper* v. *Aaron*, 358 U.S. at 8. By the spring of 1955, the Little Rock Board of Education had adopted a plan which would have desegregated the schools by 1963. *Id.* A large majority of the citizens of Little Rock agreed that the plan was "the best for the interests of all pupils in the District." *Id.* The plan was approved by the federal district court, *Aaron* v. *Cooper*, 143 F. Supp. 855 (E.D. Ark. 1956), and this Court, *Aaron* v. *Cooper*, 243 F.2d 361 (8th Cir. 1957), and review was not sought in the Supreme Court.

Meanwhile, the state intervened to prevent desegregation of the Little Rock schools. In November, 1956, Arkansas's voters adopted three initiatives sponsored by the state's political leadership. These included:

> 1. An amendment to the state constitution directing the legislature to oppose *Brown* in every constitutional manner until such time as the federal government ceases from enforcing *Brown*, and providing that any employee of the state, or any of its subdivisions, who willfully refuses to carry out the mandates of this amendment shall automatically forfeit his office and be subject to prosecution under penal laws to be enacted by the legislature. Ark. Const. Amend. 44. Although this amendment remains on the books, it is recognized by the state authorities as being unconstitutional.
>
> 2. A resolution of interposition calling on all states and citizens to adopt a constitutional amendment prohibiting federal involvement in public

education, and pledging resistance to school desegregation.

3. A pupil placement law, Ark. Stat. §§ 80-1519 to -1524, authorizing local boards of education or superintendents to transfer or reassign students or teachers among any schools within their districts, or to "adjoining districts whether in the same or different counties, and for transfer for school funds or other payments by one Board to another for or on account of such attendance." *Dove* v. *Parham*, 176 F. Supp. 242, 244 n.4 (E.D. Ark. 1959).

See 584 F. Supp. at 330-32.

In January, 1957, the state legislature enacted, and the Governor signed, legislation implementing the constitutional amendment, including legislation authorizing local school districts to spend school funds to defend integration litigation, and to relieve (or at least to delay) school children from compulsory attendance at racially mixed schools. Governor Orval Faubus also signed legislation creating a state sovereignty commission, with broad powers, to:

1. Perform any and all acts and things deemed necessary and proper to protect the sovereignty of the State of Arkansas, and her sister states from encroachment thereon by the Federal Government or any branch, department or agency thereof, and to resist the usurpation of the rights and powers reserved to this State or our sister states by the Federal Government.

2. Give such device and provide such legal assistance as the Commission considers necessary or expedient, when requested in writing to do so by resolution adopted by the governing authority of any school district, upon matters, whether involving civil or criminal litigation or otherwise, relating to the commingling of races in the public schools of the State.

> 3. Study and collect information concerning economic, social and legal development constituting deliberate, palpable and dangerous invasions of or encroachments upon the rights and powers of the State reserved to the State under [the Tenth Amendment to the U.S. Constitution].

See 584 F. Supp. at 330-32.

The statute also required prointegration organizations to register and report to the state sovereignty commission. *See Aaron* v. *Cooper*, 163 F. Supp. 13, 15 (E.D. Ark. 1958).

Notwithstanding these actions, the Little Rock Board of Education took preliminary steps to admit nine black students to Central High School in the fall of 1957. Governor Faubus, however, barred the nine students from entering Central High School by ordering the Arkansas National Guard to stand at the schoolhouse door and to declare the school "off limits" to black students. President Eisenhower responded by dispatching federal troops to guarantee the admittance of the nine black students. They were admitted after the troops arrived and the troops remained in Little Rock for the rest of the school year. Subsequently, the federal district court enjoined Governor Faubus from using the Arkansas National Guard to obstruct or interfere with court orders, *Aaron* v. *Cooper*, 156 F. Supp. 220, 226-27 (E.D. Ark. 1957), and this Court affirmed, *Faubus* v. *United States*, 254 F.2d 797, 806-08 (8th Cir. 1958).

In February 1958, "because of extreme public hostility . . . engendered largely by the official attitudes and actions of the Governor and the Legislature," *Cooper* v. *Aaron*, 358 U.S. at 12, local officials petitioned the district court to postpone until at least 1961 "the plan of gradual racial integration in the Little Rock public schools" which the Little Rock Board of Education had adopted in 1955 for implementation at the high school level for the 1957-58 school year. *Aaron* v. *Cooper*, 163 F. Supp. 13, 14 (E.D. Ark. 1958). The district court found that "between the spring and fall of 1957 there was a marked change in public

attitude toward [the school desegregation] plan," that persons who had formerly been willing to accept it had changed their minds and had come to the conclusion "that the local School Board had not done all it could do to prevent integration." 163 F. Supp. at 21. The court noted that the state legislature's 1957-58 "enactments had their effect at Little Rock and throughout the State in stiffening opposition to the plan[."] *Id.* Because of this state-fostered "opposition . . . to the principle of integration which . . . runs counter to the pattern of southern life which has existed for over three hundred years," *id.*, and the "corresponding damage to the educational program," *id.* at 26, and the City of Little Rock itself, the court held that a two-and-one-half-year moratorium on desegregation was necessary.

This Court reversed, *Aaron* v. *Cooper*, 257 F.2d 33, 40 (8th Cir. 1958), and the Supreme Court affirmed our decision on September 12, 1958, quoting with approval a pleading filed by the school board:

> The legislative, executive, and judicial departments of the state government opposed the desegregation of Little Rock schools by enacting laws, calling out troops, making statements vilifying federal law and federal courts, and failing to utilize state law enforcement agencies and judicial processes to maintain public peace.

Aaron v. *Cooper*, 358 U.S. 1, 15 (1958).

While the above appeal was pending, opponents of desegregation secured a state court injunction to prevent the opening of the "partially integrated high schools" of Little Rock. Once again, the federal district court set aside the injunction and this Court affirmed. *See Thomason* v. *Cooper*, 254 F.2d 808 (8th Cir. 1958).

In August, 1958, Governor Faubus called an "emergency session" of the legislature, which enacted three laws aimed at preventing the Little Rock Board of Education from complying with *Brown*. Act 4 authorized the Governor, by proclamation, to close any or all public schools within any school district

pending a referendum "for" or "against" the "racial integration of all schools within the school district;" Act 6 permitted students to transfer to segregated public or private schools across district lines if the schools they ordinarily attended were to be desegregated; and Act 9 authorized the removal by recall of any members of local school district boards. (This Act was aimed at removing from the Little Rock Board of Education those who favored desegregation.)

On September 13, 1958, Governor Faubus issued a proclamation closing the four Little Rock high schools, white and black. They remained closed throughout the 1958-59 school year, with the school board leasing the schools to a private school corporation which intended to operate them on a segregated basis. The federal courts found that such operation would be unconstitutional and enjoined the private corporation from operating the schools, *see Aaron* v. *McKinley*, 173 F. Supp. 944, 952 (E.D. Ark. 1959), *aff'd sub nom. Faubus* v. *Aaron*, 361 U.S. 197 (1959) (per curiam). Nevertheless, the Little Rock schools remained closed for the entire school year, and during this period, many white and some black students from Little Rock attended segregated schools in PCSSD. The Arkansas state legislature enacted a statute authorizing the state to pay for the interdistrict transfer of students from desegregated to segregated public and private schools. Ark. Acts 1959 No. 236. *See* Ark. Acts, Special Session 1958, No. 6. In 1960, an independent study described the number of transfers among the three Pulaski County school districts to preserve segregation as "excessively high." 584 F. Supp. at 339. Significant numbers of interdistrict transfers continued until 1965. PX 10.

Shortly after the school closing act was declared unconstitutional, the Little Rock Board of Education announced that it would reopen the Little Rock high schools for the 1959-60 school year because "we will not abandon free public education in order to avoid desegregation." *Norwood* v. *Tucker*, 287 F.2d 798, 805 (8th Cir. 1961). The Board also publicly announced, however, that it awaited advice from "Governor

Faubus and his attorneys . . . [on] any method whereby we may maintain compulsory segregation and still operate our public high schools." *Id.* During the 1959-60 school year, students were assigned to particular schools in accordance with the Arkansas pupil placement laws of 1956 and 1959. Ark. Stat. Ann. §§ 80-1519 through 1234. In *Parham* v. *Dove*, 271 F.2d 132 (8th Cir. 1959), and *Dove* v. *Parham*, 282 F.2d 256 (8th Cir. 1960), we held that the Arkansas pupil placement laws were not facially unconstitutional although we recognized that the laws could in practice be used to perpetuate segregated schools. 271 F.2d at 136.

In *Norwood* v. *Tucker*, 287 F.2d 798 (8th Cir. 1961), we held that the Little Rock Board of Education was using "the standards and criteria . . . [of the Arkansas pupil placement laws] for the purpose of impeding, thwarting and frustrating integration." *Id.* at 808. We called the Board's attention to the continuing injunction in the first *Aaron* case requiring them to "'take affirmative steps' . . . to facilitate and accomplish operation of the school district on a nondiscriminatory basis." *Id.* at 809.

Thereafter, the Little Rock Board of Education attempted to use the Arkansas pupil placement law in a nondiscriminatory fashion. However, in 1965, litigation was once again commenced alleging that black children were being denied admittance to predominantly white schools in Little Rock and "assigned to 'Negro' schools near their home." *Clark* v. *Board of Education of Little Rock School District*, 369 F.2d 661, 665 (8th Cir. 1966).

On April 22, 1965, the Board formally abandoned use of the pupil assignment law and adopted a freedom-of-choice plan. When the litigants in the *Clark* case, *id.*, alleged that this freedom-of-choice plan failed to meet constitutional standards, the Little Rock School Board advanced "a number of desegregation plans . . . in a good faith effort to provide a solution to continuous litigation." *Little Rock School District* v. *Pulaski County Special School District*, 584 F. Supp. at 334. However, the Board "[u]ntil January . . . was faced with a

hostile governor and state administration and an unfriendly legislature," *id.*, which helped stir up a "hysterical political atmosphere," *id.*, that led to the defeat of the several proposals for more effective school desegregation.

Little Rock continued to rely on a freedom-of-choice desegregation plan (as modified in *Clark*, 369 F.2d 661) until, by 1968, it became clear that this plan was generally ineffective and would not meet the constitutional standards which the Supreme Court had recently spelled out in *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 438 (1968); *Raney* v. *Board of Education of Gould School District*, 391 U.S. 443 (1968); and *Monroe* v. *Board of Commissioners of City of Jackson*, 391 U.S. 450 (1968). We noted in *Clark* v. *Board of Education of Little Rock School District*, 426 F.2d 1035, 1043 (8th Cir. 1970), that, despite considerable progress in desegregating several Little Rock schools, "[u]nder 'freedom of choice' in 1968-69 approximately 75% of the Negro students attended schools in which their race constituted 90% or more of the student body."

For the 1969-70 school year, the Little Rock Board of Education adopted a plan for pupil assignment based on geographic attendance zones. In *Clark*, *id.*, we held that this plan's program for student desegregation did not meet the contitutional requirement to eliminate racial discrimination "root and branch." *Id.* at 1041. We ordered the Little Rock Board of Education to file with the district court an effective desegregation plan for implementation no later than the 1970-71 school year.

Ultimately, it was not until the 1973-74 school year that most Little Rock schools were desegregated. *See* School Desegregation in Little Rock, U.S. Commission on Civil Rights 7 (June, 1977). Thus, although the Little Rock Board of Education had announced shortly after *Brown I* that it would begin to desegregate its schools by 1957 and complete the process by 1963, the active intervention of the state was a central factor in delaying desegregation of the Little Rock schools until 1973, and in contributing to the increasing

concentration of blacks in LRSD.* The district court found that throughout this period and to this day, the state has never acknowledged its affirmative duty to assist local school districts in their desegregation efforts and has never promulgated any rules or guidelines which would encourage the local school districts to eliminate discrimination in their

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*The district court's finding that specific discriminatory actions by the defendants had a substantial and continuing effect on the racial composition of LRSD is supported by general and school population statistics. From 1950 to 1960, the white population of the City of Little Rock declined significantly (if growth through annexation is excluded), while the white population of North Little Rock and the remainder of Pulaski County increased at an extraordinary rate. Including population gains through boundary expansions of the Cities of Little Rock (13,219 persons added by annexation) and North Little Rock (6,414 persons added by annexation), and corresponding population losses in the unincorporated areas of Pulaski County, the white population of the City of Little Rock increased by only 3,807 from 1950 to 1960 while the white population of North Little Rock increased by 11,526 and the white population of the remainder of Pulaski County increased by 13,266. These demographic data were generally contrary to statewide trends in Arkansas during the same period, and tend to support plaintiffs' theory that the state-created racial turmoil in LRSD in the 1950's fostered substantial white flight from LRSD to PCSSD and NLRSD. This trend continued throughout the 1960's and then accelerated during the 1970's. By 1980, the white population of PCSSD had increased to 123,000 from 50,000 in 1950. During the same period, PCSSD's black population increased by less than 10,000. *See* BUREAU OF THE CENSUS, 1950, 1960, 1970 and 1980 CENSUS OF THE POPULATION, CHARACTERISTICS OF THE POPULATION—ARKANSAS.

From 1956 to 1973, the black student population in LRSD increased from 3,481 to 10,274, an increase of over 87%. During the same time, the white student population of LRSD decreased from 16,242 to 11,951, a decrease of 25%. *See Aaron* v. *Cooper*, 143 F. Supp. 855, 860-61 (E.D. Ark. 1956), and PCSSD exhibit 9.

school systems. Nor has it taken action to foster racially neutral school siting. Rather, it has approved racially segregative school sitings in violation of district court decrees as recently as 1980. *Id.* It has fostered impressive programs to improve the quality of education generally, but has made no effort to improve the instruction of educationally deprived and discriminatorily served black students. 597 F. Supp. at 1228. It provides funds for transportation but does not provide specific funds to aid transportation for desegregation. 597 F. Supp. at 1228. It has also failed to seek all federal funds available to aid desegregation efforts. Since the 1950's, it has encouraged consolidation of school districts to promote efficiency and quality of education, but has taken no action to encourage consolidation to end the racial segregation which it required for over a century. 597 F. Supp. at 1228. To this day, the state takes the position that Arkansas law does not permit it to assist local school boards in their desegregation efforts. Brief of Appellant State Board at 6.

C. The Pulaski County Special School District's Role in the Segregation of the Pulaski County School Districts.

The district court set forth in some detail the factors it considered significant to its holding that PCSSD had committed significant interdistrict violations. It further found that these violations are of a continuing nature and justify imposing an interdistrict remedy which would include PCSSD. These findings are not clearly erroneous.

PCSSD was created in 1927 pursuant to Act 152 of the 1927 Arkansas Acts, which gave the residents of Pulaski County outside of the cities of Little Rock and North Little Rock the right to organize a single school district. On July 21, 1927, a consolidated school district was approved by referendum. Pursuant to this referendum, the Pulaski County Board of Education ordered that "all of Pulaski County outside the territory embraced in the cities of Little Rock and North Little Rock be created and organized into a special school district to be named and known as Pulaski

County Special School District." 584 F. Supp. at 340. "The historic intention [was] that the boundaries of the cities of Little Rock and North Little Rock remain coterminous with the respective school districts[.]" 584 F. Supp. at 340.

PCSSD maintained inadequate elementary schools for blacks and was without an accredited high school for blacks until 1955. 584 F. Supp. at 329-30. Accordingly, many black elementary students from the county and any student from the county who wished to attend an accredited high school had no reasonable alternative other than to attend the black schools in Little Rock. 584 F. Supp. at 330 ("As far as the education of blacks were concerned, school district boundaries in Pulaski County were ignored"). Pulaski County paid for many interdistrict transfers. Some black families moved from the county to Little Rock because of the disparities in educational opportunities. J.D.R. at 915-19; 584 F. Supp. at 330-40.

In 1953, PCSSD cooperated with LRSD and the state in a substantial interdistrict segregative act by permitting the annexation of lands for the construction of a black residential housing project, the Granite Mountain project, thus insuring that the black students in the project would attend school in LRSD rather than PCSSD, and enhancing LRSD's position as the school district with the responsibility of educating black children. This housing project is discussed in greater detail *infra*. When the state closed LRSD for the 1958-59 school year to avoid the desegregation of that school system, PCSSD accepted students from the Little Rock schools into the segregated schools of the county. These interdistrict transfers continued until the mid-1960's.

Until the late 1960's, LRSD generally grew as the City of Little Rock grew, and there is no contention that these annexations, with the significant exception of the Granite Mountain project, were intended to have a segregative effect.[9]

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[9]Cammack Village was annexed in 1948. The record does not reveal the number of students involved in this annexation and

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In 1968, the Supreme Court announced that freedom-of-choice plans were failing to dismantle dual school systems and that "if it cannot be shown that such a plan will further rather than delay conversion to a unitary, nonracial, nondiscriminatory school system, it must be held unacceptable." *Monroe*, 391 U.S. at 459; *Raney*, 391 U.S. at 446; *Green*, 391 U.S. at 439. It required that segregation be eliminated root and branch. The black parents and children of LRSD took immediate action to secure compliance with these decisions. This Court complied with the Supreme Court mandate and required LRSD to implement a comprehensive plan to desegregate the schools of that district. *See Clark* v. *Board of Education of Little Rock School District*; 426 F.2d 1035 (8th Cir. 1970), *cert. denied*, 402 U.S. 952 (1971); *Clark* v. *Board of Education*, 449 F.2d 493 (8th Cir. 1971), *cert. denied*, 405 U.S. 936 (1972), *aff'd*, 471 F.2d 656 (8th Cir. 1972) (mem.). After

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no party to this litigation attributes any discriminatory purpose to this annexation. J.D.R. 2104-06. Euclid Place was annexed in 1949. The record indicates that nineteen students were involved in this annexation. J.D.R. 2107. No party to this litigation attributes any discriminatory purpose to this annexation. Meadowcliff, Pleasant Valley and Brady were annexed in 1961. The record does not reveal the number of students involved and the parties attribute no discriminatory purpose to this transfer. J.D.R. 2108-50. Each of the annexations cited above came at a time when each Pulaski County school district was operating a dual school system. Walton Heights was annexed in 1967. The number of students involved in the annexation is not disclosed in the record, but the annexation encompassed only .0058% of the value of the real property in PCSSD. J.D.R. 2169-85. Candlewood was annexed in 1968. It was a white residential area and apparently the annexation was not a significant one as it involved only .0016 of the assessed valuation of the County. J.D.R. 2186-2202, 655, 823. In addition to the five annexations outlined above, LRSD annexed a tract of uninhabited land in 1964 for use as a site for the Metropolitan Vocational School to be open to students from LRSD and PCSSD school districts. J.D.R. 2150-68, 651. T. at 1129.

the Supreme Court decided the *Green* trilogy, the concurrent annexation of lands by the City of Little Rock and LRSD ended and, from that point on, the city continued to expand, but the boundaries of LRSD remained relatively static. *Little Rock*, 584 F. Supp. at 340. The district court found that "Pulaski County Special School District's acts of freezing its boundaries to discontinue the practice of allowing City and Little Rock School District boundaries to remain coterminous springs from an unconstitutional racial motive that has significant interdistrict effects on the Little Rock School District." 584 F. Supp. at 341 (finding 26).[10]

As a result, by 1984, the City of Little Rock encompassed ninety-one square miles while LRSD covered only fifty-three square miles. Attractive industrial and residential areas in the county were made a part of the City of Little Rock but remained within PCSSD rather than becoming part of LRSD. These areas are residential sections in which many white families lived or have moved and, as a result, their children now attend schools in PCSSD. If the boundaries of the City of Little Rock and its school district had remained coterminous, the black-white ratio in the Little Rock schools would now be sixty-forty rather than seventy-thirty.[11]

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[10]The district court found that PCSSD was interested in consolidation until the early 1970's when LRSD adopted a comprehensive desegregation plan. (The latest expression of such interest came on May 14, 1968, when the PCSSD Board agreed to accept LRSD's request for a meeting of the two boards to consider consolidation. Records and Proceedings of PCSSD Board, May 14, 1968; 584 F. Supp. at 341 finding 22.) On May 13, 1970, this Court *en banc*, in an opinion by Judge M. C. Matthes, required LRSD to implement a comprehensive desegregation plan consistent with the *Green* trilogy, decided on May 27, 1968. *Green*, 391 U.S. at 439; *Raney*, 391 U.S. at 446; *Monroe*, 391 U.S. at 459. The district court finding that the PCSSD Board's change in attitude toward consolidation was, in part, racially motivated is not clearly erroneous.

[11]Approximately 20,000 whites and 3,000 blacks live in the areas of the City of Little Rock which are now included in

(footnote continued on next page)

The district court found that the boundaries between PCSSD and LRSD had been maintained to keep LRSD predominantly black and PCSSD predominantly white. It further found that these boundary manipulations have had a substantial interdistrict segregative effect. 584 F. Supp. at 351. These findings are not clearly erroneous.[12] They were based on the facts recited herein and on the expert testimony of Dr. Robert Dentler who testified that the boundary lines had an interdistrict effect. He went on to state:

> . . . The major consequence of the boundary lines established as they were in 1928 at the peak of

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PCSSD. Ten schools located in this area serve approximately 3,000 white students and 300 black students who live within the city limits. Nearly 1,500 additional white students and 323 black students living in the city are bused to PCSSD schools located beyond the city limits.

[12] The district court also found:

> Because of the large numbers of formal and informal transfers of students among the districts and the abetting of the transfers by the districts, the cooperation among the districts and their personnel in other areas, the recurrent consideration of consolidation and the long-standing practices of annexations to the two city districts, the Court finds that the three school districts in Pulaski County were not historically separate and autonomous.

584 F. Supp. at 341.

Although we find substantial evidence in the record to support the district court's findings of extensive interdistrict cooperation in attempting to confine blacks to central Little Rock, we find that the court clearly erred in finding that the three Pulaski County school districts were not separate and autonomous. Among the factors that clearly indicate that the districts were historically separate school districts are that each district has always levied its own taxes, elected its own board of education, hired its own faculty and staff, and established its own salary schedule, operating rules and regulations.

consolidation efforts initiated by small rural districts of the County and with the support of the State, have by now come to a condition where they keep the Little Rock School District very predominately black and limit the opportunities therein of black students.

The boundaries also have generated consequences with respect to differences in State aid, State aid for instructional and related services generally and State aid for transportation. While the differences which have favored the County over the years have been remedied very recently there are all of the years in which the State aid formulas supported the County to the benefit of non-black higher proportions by far of non-black students and a disadvantage both to Little Rock School District and North Little Rock.

The boundaries also echo with refusals to modify them from within the Boards of Directors, at least since 1968. In other words, after years of conversation about the merits of the boundaries, about mutual assistance especially for purposes that have not to do with race, suddenly these boundaries harden and the Pulaski County Board refuses any further modification of them on the one side, and the Little Rock Board of Directors does not move or press on modifications so far as I can find.

The boundaries also signify to me that under them, under the circumstances of a suburban system what was rural, what once existed as 38 rural counties, now congealed into a modernizing suburban system is such that under these boundary conditions school construction follows real estate development, not educational needs.

T. at 379-80; T. at 69; 584 F. Supp. at 340-41.

During the first two decades of tumultuous desegregation in LRSD, PCSSD schools remained segregated and free from

the problems which accompanied state-resisted desegregation in Little Rock. It was not until 1968 that suit was first brought to desegregate the PCSSD schools. *Zinnamon* v. *Board of Education of Pulaski County Special School District*, No. LR-68-C-154 (E.D. Ark. 1971), slip op. at 1. This suit remained dormant until 1970, while the Department of Health, Education & Welfare negotiated with the PCSSD Board of Education to work out an integration plan. After extensive litigation which led to an order enjoining PCSSD's discriminatory school construction plans, PCSSD consented to the entry of a decree by Judge J. Smith Henley—then Chief Judge of the United States District Court for the Eastern District of Arkansas—integrating its schools. *Zinnamon* v. *Board of Education of Pulaski County Special School District*, No. LR-68-C-154 (E.D. Ark. 1973). The district court found that PCSSD had failed to comply with the Henley decree and noted that, at trial, many PCSSD Board of Education members were not even aware of the contents of the decree. Some of the more significant violations found by the court were:

1. After 1973, PCSSD continued to close schools in black neighborhoods and to build new schools in distant suburbs that were the developing areas of white population. 584 F. Supp. at 346. Many of the new schools are over ninety percent white. *Id.* For example, Northwood Junior High School was opened in 1980 in a remote location far from a black residential area and has a student enrollment which is only eight percent black. North Pulaski was built in 1977, remote from any black residential areas in the furthest reaches of Pulaski County, and in 1983, had a black student population of about six percent. Cato Elementary School was built in 1975, again in a remote area and, in 1983, it had a student population which was less than ten percent black. Robinson Middle School was built in 1981, and in 1983, had a black student population of slightly over eleven percent. The district court credited the testimony of Dr. Robert Dentler, plaintiffs' expert witness, that "the county took pains not to site new schools where they would be accessible to blacks, and others they dusted off old dilapidated

plants and arranged to have them as walk-in schools for black students well out of reach of possible transportation by white students." There has been no new construction in or near the central part of the county, or to the east or southeast, where blacks live. The district court concluded that there were substantial and continuing inter- and intradistrict effects from PCSSD's violation of *Zinnamon's* specific order that PCSSD must cease and desist now and in the future from building schools in sites which are not equally accessible to blacks and whites. 584 F. Supp. at 346. All of these events are contrary to *Swann's* admonition against the location of new schools "in the areas of white suburban expansion, farthest from Negro population centers." *Swann*, 402 U.S. at 20-21.

2. Student assignments continue to be made on a racially discriminatory basis. Thus, in 1983, of fifty-one schools in PCSSD, sixteen are racially identifiable as black schools and thirteen are racially identifiable as white schools. In some instances, neighboring schools are operated as racially identifiable schools. Thus, Mabelvale Junior High School is close to Cloverdale Junior High School (both are within the City of Little Rock but are part of PCSSD), but Mabelvale's enrollment in 1983 was only 12.7 percent black while the Cloverdale's enrollment was slightly more than thirty-three percent black. 584 F. Supp. at 354-55. PCSSD maintains racially identifiable black schools by not busing in white students and by busing in additional black students. 584 F. Supp. at 348. PCSSD buses black students to Wakefield, Watson, and Cloverdale schools even though these schools have some of the highest enrollments of blacks in PCSSD and are located a short busing distance from identifiably white schools. 584 F. Supp. at 348, 354-55. Racially identifiable white schools are maintained by not busing blacks to schools built in white neighborhoods. 584 F. Supp. at 348.

3. Similarly, PCSSD failed to apportion the burden of busing fairly among white and black students. Thus, a black student enrolled in the PCSSD system is two and one-half times more likely to be bused for desegregative purposes than a white student, 584 F. Supp. 348, and a disproportionate

number of black students in PCSSD are bused long distances, often to schools which are already racially identifiable as black. *Id.*

4. PCSSD cooperated with the City of Little Rock in the location and building of Fair and Otter Creek Schools in white neighborhoods within the city limits but just outside the boundaries of LRSD. 584 F. Supp. at 346. Both schools are racially identifiable as white schools. Fair High School, which has a thirteen percent black enrollment, is located less than two miles from LRSD's Parkview High School which has a fifty-six percent black enrollment, and is a reasonable busing distance from PCSSD's Mills High School which has an enrollment of over forty percent black. 584 F. Supp. at 356. Otter Creek has a black enrollment of only fourteen percent, but is located near several PCSSD and LRSD elementary schools with significantly higher black enrollments.

5. PCSSD failed to meet the goals for the hiring and promotion of black principals, teachers and administrators. 584 F. Supp. at 347-48. Accordingly, there are fewer employment and promotion opportunities for blacks in PCSSD and the absence of black role models in teaching and administration. *Id.* These factors have discouraged the growth of a black community in PCSSD. 584 F. Supp. at 347.

6. The chances that a black student will be classified as educably mentally retarded are significantly greater in PCSSD than they are in LRSD. 584 F. Supp. at 350.

7. Unlike LRSD, PCSSD has failed to develop programs to encourage the participation of black students in curricular and extracurricular activities. 584 F. Supp. at 348.

8. PCSSD has failed to comply with requirements that a Bi-Racial Committee be established and that two black citizens, elected and selected by the black community, serve in ex-officio capacity on its Board of Education. 584 F. Supp. at 347. This failure reduced the input of the PCSSD black community on school site selection and housing project decisions and exacerbated the historical trend of black in-migration to LRSD and white out-migration to PCSSD.

D. North Little Rock's Role in Segregating the Three Districts.

The district court found that NLRSD had committed several significant interdistrict violations. Our review of the record convinces us that the trial court's findings with respect to the violations listed below are not clearly erroneous, and that the current interdistrict impact of these violations justifies and interdistrict remedy which would involve NLRSD. We do, however, take the nature and extent of NLRSD violations into consideration in framing a remedy (which is in largely intradistrict with respect to that district).

In the pre-*Brown* period, NLRSD failed to maintain equal or adequate schools for black students, particularly at the high school level. This failure led to significant transfers of black high school students from NLRSD to LRSD, and contributed to the concentration of blacks in LRSD, 584 F. Supp. at 330, a concentration which has continued to this day.

When the LRSD schools were closed for the 1958-59 school year, NLRSD, along with PCSSD, opened its segregated schools to many white and some black students from LRSD. These transfers continued in significant numbers until the mid-1960's and played a substantial role in delaying desegregation in LRSD. 584 F. Supp. at 339-40.

NLRSD has failed to comply fully with desegregation orders of the district court, *Davis* v. *Board of Education*, No. LR-68-C-151 (E.D. Ark. 1977), and this Court, *Davis* v. *Board of Education*, 635 F.2d 730 (8th Cir. 1980), with respect to the desegregation of faculty and staff. 584 F. Supp. at 348. Thus, blacks have a measurably smaller chance of being hired as teachers or administrators in NLRSD than in LRSD.

NLRSD maintains segregation within its school system in part by grossly overclassifying its black pupils into special education and educable mentally retarded (EMR) categories.

It classifies over *nineteen percent* of its black students as retarded or learning disabled, nearly *three-and-one-half times as many as are similarly classified in LRSD.* 584 F. Supp. at 348 Moreover, its EMR placement rate for blacks is 8.9 times higher than it is for whites, compared to a national average placement rate of two and one-half times as many black students as white students. Placing children in Special Education: A Strategy for Equity 10 (K. Heller, W. Holtzman, and S. Messick, eds. 1982).

NLRSD argues that the overrepresentation of blacks in its EMR classes can be explained by economic and social factors, as well as differences in IQ between black and white students. The district court rejected this argument after hearing all the expert testimony on the issue. He did not err in so holding. These factors may explain why there may be more black than white EMR students, but they do not explain why the NLRSD experience should be so different than that in the nation, in Arkansas or in LRSD, nor do they explain why black students are not similarly overrepresented in the specific learning disability categories. The appellees' experts attributed this difference in EMR classification to race, and the district court was justified in accepting this opinion and in holding that this difference discouraged black students from attending that district.

E. Interdistrict Housing Violations by the Defendants.

The district court made detailed and extensive findings regarding the existence of segregated housing in the Little Rock metropolitan area and regarding the causal role of the State of Arkansas and PCSSD in creating and perpetuating this condition. After reviewing these findings for clear error, we find none, and conclude that the record amply supports the district court's determination.

The district court found that "[p]ublic housing in Pulaski County has historically been the subject of racial segregation." *Little Rock School District* v. *Pulaski County*, 584 F.2d 328, 341 (E.D. Ark. 1984). As with private housing patterns,

this demographic fact is the product of interrelated discriminatory conduct on the part of the state and the county. The state delegated its responsibility in public housing to city and county governments by authorizing them to operate housing authorities upon the adoption by each of an appropriate enabling resolution. Ark. Stat. Ann. § 19-3004. The cities of North Little Rock and Little Rock have adopted these resolutions, but Pulaski County has not done so. Although the resolutions empower the cities to develop and construct public housing projects up to ten miles beyond city limits, neither city housing authority has ever built a project in PCSSD, and the record does not indicate that Pulaski County has constructed such housing. *Id.* at 341.

Typical of the pattern of development was the 1953 Granite Mountain public housing project. B. Finley Vinson, chairman of the board of the holding company which owns the largest bank in Arkansas and who was an executive with the Little Rock Housing Authority from 1950 to 1954, testified that, in the early 1950's, the state, the Little Rock Housing Authority, LRSD, and PCSSD cooperated in the development of a major all-black housing project which was intended to channel black residential development toward the far southeast boundaries of the City of Little Rock, away from white residential areas. He stated that "[i]t should be made very clear that . . . this was a device to maintain segregation of races. . . . There was no bones made about it." Although this land was part of the PCSSD, the decision was also made at the state and local level for LRSD to annex this territory from PCSSD to ensure that this black development was channeled into LRSD, which was the only district capable of providing education for blacks. Mr. Vinson testified that the LRSD "worked out the annexation with the County School District." In order to effect this transfer of land from PCSSD to LRSD, the Arkansas legislature in 1953 passed an act, Ark. Stat. Ann. § 80-436 (Repl. 1980), which allowed the land transfer without resort to the standard procedures set forth in Ark. Stat. § 80-456. Mr. Vinson testified that over 500 segregated housing units were constructed

at Granite Mountain (with clearance of forty or fifty preexisting units), and that, as was expected, many more segregated housing units were built in this area in the following years. This area is still an essentially segregated black housing area served by several schools which have overwhelmingly high black enrollments ranging from seventy-one percent to one hundred percent black.[13] In sum, there is substantial evidence in the record to support the district court's finding that PCSSD cooperated with the state, the Little Rock Housing Authority and LRSD in this intentional and successful attempt to segregate blacks in a nearly all-black neighborhood and in nearly all-black schools within LRSD. 584 F.Supp. at 342.

The district court also found that the Little Rock Housing Authority accentuated segregation in public housing and, thus, in schools, by razing black neighborhoods (which

[13]There are five schools in the general area of the Granite Mountain project and the related segregated black housing which has grown around the project. Horace Mann Junior High in 1982 had an enrollment of 654 students, 501 of whom are black. Booker Intermediate had an enrollment in 1982 of 411 students, 342 of whom are black. Rockefeller Intermediate had an enrollment in 1982 of 402 students, 288 of whom are black. Carver Elementary had a 1982 enrollment of 495 students, all of whom are black. Washington Elementary had a 1982 enrollment of 307 students, 217 of whom are black. There are no high schools in this general area, and the students from this overwhelmingly black residential area apparently attend Central High School. In sum, without considering high school students, more than 2,000 students—approximately eighty percent of whom are black—live in the Granite Mountain project and related areas. These students generally attend junior high, intermediate and elementary schools which have enrollments which are over eighty percent black. The district court credited the testimony of Dr. Charles Willie, Professor of Education and Urban Studies at the Harvard Graduate School of Education, that this all-black housing project was a significant "magnet factor" in attracting a disproportionate number of blacks to LRSD. 584 F.Supp. at 345, 347.

bordered on white areas) and relocating the uprooted blacks in housing projects in eastern Little Rock. White residents, whose neighborhoods were more selectively cleared, were relocated to western Little Rock. The district court found that these decisions were part of "a deliberate policy of the Little Rock Housing Authority and other governmental bodies to maintain a residential racial segregation." *Id.*

The concurrent acts of governmental bodies, especially the state and county school districts, are also reflected in the racially segregated private housing market in metropolitan Little Rock. The district court cited as especially probative of state liability the example of a black realtor who was disciplined by the state real estate commission. The realtor, who sold a home to a black in a white neighborhood, had violated a commission regulation which forbade realtors from being "instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or nationality, or any individuals whose presence will clearly be detrimental to property values in that neighborhood." Although the realtor received his license, the state commission warned him about such "misconduct," and he was fired from his job. *Id.*

PCSSD also contributed to the segregated nature of the private housing market through its decisions in school siting. As Chief Justice Burger has written, "People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the pattern of residential development of a metropolitan area and have important impact on the composition of inner city neighborhoods." *Swann*, 402 U.S. at 20. According to the district court's factual findings, PCSSD violated the *Zinnamon* decree by building nearly a dozen new schools after 1973 in the furthest outlying areas of developing white populations. These schools now have enrollments that are generally over ninety percent white. *Id.* at 346. As we have noted, *supra* at 28, Dr. Robert Dentler testified about the

racially discriminatory nature of these school siting decisions. The district court concluded that decisions on school sites were made "without any consideration given to the impact or effect such selection would have on desegregation and is therefore a constitutional violation." *Id.* at 346.

The district court's generalized factual findings (which are based on the specific facts we have recounted here) are direct and unequivocal:

> 36. These housing practices, both public and private, together with the manner in which predominantly black areas were willingly transferred to the Little Rock School District from the Pulaski County Special School District contributed greatly to the disparity in the racial composition of these school districts. . . .
>
> * * * *
>
> 66. The magnet factors of relatives, jobs and public housing units have encouraged high proportions of blacks migrating to move to the Little Rock School District.

Id. at 342, 345.

After careful review of the long record compiled below, we conclude that the district court's factual findings are valid and do not embody clear error according to the standard of review we have set forth above.

We also conclude that the district court committed no error of law in examining segregative housing patterns perpetuated by the state and PCSSD. As an aspect of school desegregation cases, the housing issue was first addressed by Justice Stewart, concurring in *Milliken I*:

> Were it to be shown, for example, that state officials had contributed to the separation of the races by drawing or redrawing school district lines, by transfer of school units between districts, *or by*

> *purposeful, racially discriminatory use of state housing or zoning laws*, then a decree calling for transfer of pupils across district lines or for restructuring of district lines might well be appropriate.

418 U.S. at 755 (emphasis added).

At least two courts of appeals have acted on Justice Stewart's suggested standard of liability and have held state governments responsible for remedying school segregation which was partially the result of state-authorized local housing authorities. [14] In the Indianapolis case, the district court recounted a long history of segregated housing, as a result of which less than one percent of Indianapolis's suburban population was black. *United States* v. *Board of School Commissioners*, 332 F.Supp. 655 (S.D. Ind. 1971). The court attributed residential segregation (and, hence, school segregation) in part to housing violations committed by the Housing Authority of the City of Indianapolis (HACI). The court found that, from 1957 through 1971, HACI built public housing projects in areas within the Indianapolis Public Schools (IPS) inhabited ninety-eight percent by Negroes, but none in the suburban school districts. *United States* v. *Board of School Commissioners*, 456 F.Supp. 183, 189 (S.D. Ind. 1978), *aff'd in part & vacated in part*, 637 F.2d 1101 (7th Cir.), *cert. denied*, 449 U.S. 830 (1980). The district court held that

> the action of such official bodies in locating such projects within IPS . . . [was] racially motivated with the invidious purpose to keep the black within the pre-Uni-Gov Indianapolis and IPS, and to keep

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[14] Although a majority of the United States Supreme Court has not specifically addressed the extent to which housing violations support interdistrict remedies in school desegregation cases, we note that the Supreme Court has denied certiorari in each of the cases we cite. While this does not necessarily imply approval on the merits, it is a fact which "cannot be overlooked." *Liddell* v. *State of Missouri*, 731 F.2d 1294, 1203 n.8 (8th Cir. 1984), and cases cited therein.

> the territory of the added suburban defendants segregated for the use of whites only. . . .
>
> . . . [I]t was obvious that the natural, probable and foreseeable result of erecting public housing projects wholly within IPS territory would be to concentrate poor blacks in such projects and thus to increase or perpetuate public school segregation within IPS.

Id. at 189.

The Court of Appeals held that the district court's findings were amply supported in the record, *United States* v. *Board of School Commissioners*, 637 F.2d at 1110, and affirmed the district court's finding "that the decision in the 60's to locate all public housing in Marion County within the boundaries of IPS was the result of segregative intent by the responsible state agencies." *Id.* at 1111.

Although the district court in the Indianapolis case did not elaborate its reasoning, it found that, along with legislation which discriminatorily reorganized the City of Indianapolis relative to the Indianapolis School District, the state was responsible to some extent for the housing violations which exacerbated the segregation of the schools. The district court referred to HACI as a "state instrumentality," *United States* v. *Board of School Commissioners*, 419 F.Supp. 180, 182 (S.D. Ind. 1975), and as we have noted above, as a "responsible state agency." As a result, the state was held responsible for funding certain ancillary services as part of the interdistrict remedy, which the Court of Appeals affirmed. *United States* v. *Board of School Commissioners*, 637 F.2d at 1116.

The courts reached a similar result in the interdistrict remedy that was adjudicated in the Wilmington, Delaware, case. The Wilmington Housing Authority operated over 2,000 public housing units in the city, but fewer than forty in the predominantly white suburbs, despite a period of "extraordinary population growth" in the suburbs. *Evans* v.

Buchanan, 393F. Supp. 428, 435 (D. Del.) (three-judge court), *aff'd per curiam*, 423 U.S. 963 (1975). As a result, the district court concluded that "[p]ublic housing policies also contributed to the concentration of minority residents in Wilmington." *Id.* The state's culpability and partial remedial responsibility in the interdistrict remedy was subsequently affirmed. *Evans* v. *Buchanan*, 582 F.2d 750 (3d Cir. 1978) (en banc).

The courts have not limited their attention to public housing violations; private housing discrimination has also been the basis for state liability in school desegregation cases. In *Evans* v. *Buchanan*, 393 F.Supp. at 434-35, a three-judge panel considered as evidence of state culpability that the Delaware Real Estate Commission, a state licensing agency, enforced a realtor's ethical canon which discriminated in the same regard as the provision cited in the case at bar. The district court reached the same result in *Oliver* v. *Kalamazoo Board of Educ.*, 368 F.Supp. 143, 183 (W.D. Mich. 1973), *aff'd sub nom. Oliver* v. *Michigan State Board of Education*, 508 F.2d 178 (6th Cir. 1974.), *cert. denied*, 421 U.S. 963 (1975). That Court concluded that "the State of Michigan should not be allowed to escape constitutional responsibilities by fractionalizing its jurisdiction through many agencies." *Id.* at 1832.

Our review of these precedents, together with the Arkansas statutes and relevant case law, is an additional factor justifying imposition of remedial liability upon the State of Arkansas. First, as regards public housing, we note that the municipal housing authorities implicated here are agencies of the state, which obliges the state to participate in the remedial phase of this litigation. In construing the Housing Authority Act, Ark. Stat. Ann. § 19-3004 *et seq.*, the Arkansas Supreme Court has declared:

> A Housing Authority is an agent of the state dealing with public health standards and falls squarely within the traditional police powers of the state. A City Housing Authority does not operate within the scope of "municipal affairs" (*i.e.*, those affecting,

> germane to or concerning the municipality and its government) as distinguished from those state officers excepted in the Home Rule Act.

Fort Smith v. *Housing Authority of the City of Fort Smith*, 506 S.W.2d 534, 536 (Ark. 1974). *See also Arkansas Louisiana Gas Co.* v. *City of Little Rock*, 506 S.W.2d 545, 550 (city and housing authority do not have a principal-agent relationship).

We believe the structure of the state housing authority law supports this reading. Although the state does not operate the housing authorities *per se*, the state legislature authorized the housing authorities (Ark. Stat. Ann. § 19-3004), promulgated a finding and declaration of statewide necessity for housing reform (§ 19-3002), established standards for the appointment, qualifications and tenure of the housing commissioners (§ 19-3005), enumerated the powers of housing authorities (§ 19-3011) (including eminent domain (§ 19-3015)), and gave the authorities the power to issue bonds (§§ 19-3017-3019).

As regards private housing segregation, we believe that the state's role in regulating real estate practices through the Arkansas Real Estate Commission, *see* Ark. Stat. Ann. §§ 71-1303, 71-1307, also implicates it in the residential segregation that contributed to the racial segregation of the Little Rock schools.

The housing violations recounted above deeply implicate the state in the constitutional violations found by the district court. Any other finding by this Court would reward the state for dividing and delegating the functions of state government among its many branches and divisions. As the district court declared in the *Kalamazoo* case:

> The State . . . cannot parcel out its jurisdiction and deliberately achieve by bits and pieces what it could not do directly by statute. When such a situation is alleged to exist, the court must look closely at the actions of each agency to determine whether it has met its constitutional responsibilities. To allow each agency to plead constitutional

> violations of other agencies in exculpation of its own would be to mock the Constitution of the United States[.]

Oliver v. *Kalamazoo Board of Education*, 368 F. Supp. 143, 185 (W.D. Mich. 1973), *aff'd sub nom. Oliver* v. *Michigan State Board of Education*, 508 F.2d 178 (6th Cir. 1974), *cert denied*, 421 U.S. 963 (1975). *See also* Note, *Housing Discrimination as a Basis for Interdistrict School Desegregation Remedies*, 93 Yale L.J. 340 (1983).

As a concurrent actor in the problem of housing discrimination, the PCSSD must also bear its share of the remedial burden. Where school boards have acted with complicity in developing schools in conjunction with discriminatory real estate development, they have been held responsible for their share of the remedy. *See, e.g., Oliver*, 368 F. Supp. at 171-73.

F. Summary of Violations

The state's actions which originally segregated LRSD and then forestalled its desegregation for over twenty years are not too remote in time to be relevant for this appeal. Rather, the long history of concurrent actions on the part of the state, PCSSD, and NLRSD exerted an unmistakable interdistrict effect on the schools of the metropolitan area by singling out LRSD as the school district which provided some educational opportunities for black students and by identifying PCSSD and NLRSD as white districts.

The acts which implicate the state as a primary constitutional violator began long before *Brown*, with a century-old, state-mandated dual school system which provided a markedly inferior education for black students. This dual system was achieved in part through the transfer of black students from NLRSD and PCSSD to LRSD. When the Little Rock Board of Education decided to comply with the Supreme Court's orders and desegregate its schools after *Brown*, the state intervened and prevented the Board from desegregating for nearly twenty years. The state persisted in opposing desegregation for thirteen years after *Brown*, and

has only taken minimal actions to assist in the desegregation of its schools to this day.

Public and private housing policies exacerbated school segregation. Public housing units were segregated and most projects were built in black residential areas in LRSD or NLRSD to serve black families. No public housing units were built in PCSSD, but the Granite Mountain project was built on land deannexed by PCSSD with state approval with the intention that this all-black project would be located in LRSD and that this would ensure that black students would attend the segregated black schools in Little Rock. The effects of this action persist until this day.

The defendant school districts have acted concurrently and independently to perpetuate the interdistrict problem of school segregation. The long legacy of inferior schools for blacks in PCSSD and NLRSD (which was exemplified by the absence of an accredited black high school until after *Brown*) induced many blacks to attend school in LRSD, often with a subsidy from PCSSD or NLRSD. PCSSD has continued to signal this attitude by ignoring the *Zinnamon* decree: it has perpetuated segregation through school siting and student assignment, unequal apportionment of the transportation burden between the races, failure to meet staff hiring goals, overclassification of black pupils in special education programs, and failure to cultivate the full participation of black students in the educational process.

Moreover, by its policies and practices with respect to annexation and de-annexation, PCSSD has committed substantial interdistrict violations. Until the Supreme Court's decision in *Green* and this Court's implementation of that decision, PCSSD willingly consented to LRSD expanding simultaneously as the City of Little Rock expanded. After that year, the City continued to expand but the boundaries of the school district remained constant. There is conflicting evidence as to the reason for this, but the district court found that PCSSD declined to deannex this land for unconstitutionally discriminatory reasons, and we believe there is substantial support in the record for this finding. The effects of

these policies and practices continue to be felt today. Nearly 5,000 students, more than eighty-seven percent of whom are white, now live within the city limits but attend PCSSD schools.

NLRSD has also contributed to interdistrict segregation, by failing to maintain adequate schools for blacks before *Brown*, by opening its segregated schools to LRSD transfers during 1958-59, by failing to comply with the desegregation orders of the district court, by grossly overclassifying its black pupils in EMR programs and by failing to desegregate the faculty and staff of its schools.

We believe it is clear that these actions by the defendants exerted a strong interdistrict influence which polarized the races and, by creating disparities in the availability and quality of black schools, set aside LRSD as the best place for black students to obtain an education. Undoubtedly, a significant percentage of white out-migration and black in-migration is attributable to factors other than racially discriminatory acts of the defendants. (These factors include the historical movement of white middle class families from the city to the suburbs and the higher fertility rate of black families.[15]) However, plaintiffs introduced substantial evidence demonstrating that a "disproportionate" number of whites, 587 F. Supp. at 347, left LRSD or moved into PCSSD instead of LRSD upon moving from other areas and that substantially more blacks moved into LRSD than would otherwise have done so in the absence of the defendants' discriminatory actions and the resulting racial turmoil in LRSD.[16] The district court found, *id.*, that plaintiffs met

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[15]Significant numbers of white children attend private or parochial schools in Pulaski County. We are not able from this record to determine that the discriminatory acts of the defendants have contributed to this phenomenon, particularly in view of the fact that the number of students attending the schools in Pulaski County happens to be consistent with national norms for metropolitan areas.

[16]The district court credited the testimony of Dr. Charles Willie, Professor of Education and Urban Studies at the

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their burden of proving that the defendants had committed substantial interdistrict constitutional violations with substantial and continuing interdistrict effects. In light of the substantial supporting evidence in the record, we cannot declare these findings clearly erroneous.

The defendants and amicus argue strongly that *Milliken I, supra, Lee* v. *Lee County Board of Education*, 639 F.2d 1243 (5th Cir. 1981), and *Goldsboro City Board of Education* v. *Wayne County Board of Education*, 745 F.2d 324 (4th Cir. 1984), dictate a contrary result. We disagree. In *Milliken I*, there was no history of state-imposed segregation, nor of state opposition to the local school district's attempt to comply with *Brown*, nor was there a history of interdistrict transfers, boundary changes, housing violations, and violations of desegregation decrees. Moreover, *Milliken I* involved the consolidation of one city district with fifty-three suburban districts in three counties, where the record was devoid of evidence indicating that the fifty-four districts were closely interrelated geographically, economically, politically and culturally, as the districts are here.

There are some superficial similarities between this case and *Lee*. In *Lee*, as here, there were two suburban districts and one city district located in a single county, and there was a history of interdistrict transfers in the pre-*Brown* period. But in *Lee*, the district court found that the interdistrict violations that had occurred were neither continuing nor

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Harvard Graduate School of Education, that the various intentionally discriminatory actions of the defendants outlined in this opinion contributed to the disproportionate movement of whites into PCSSD instead of LRSD. 584 F. Supp. at 347. He testified that, among other factors, the concentration of public housing projects in LRSD (particularly the all-black Granite Mountain project which served as the seed for three decades of segregated housing development), the existence of LRSD boundaries not coterminous with the City of Little Rock, and PCSSD's numerous violations of the *Zinnamon* decree (including school site locations) were of significance.

significant, and the Court of Appeals for the Fifth Circuit simply held that this finding was not clearly erroneous. Here, as we have already noted, the district court found that the interdistrict violations were significant and continuing, and we simply hold that these findings are not clearly erroneous. Moreover, *Lee* did not involve segregative interdistrict transfers, segregative boundary changes, or state-imposed residential segregation, and the city district had been previously declared unitary.

Goldsboro is also distinguishable from this case on several grounds. Goldsboro had been declared a unitary school system by the federal district court in 1973, *id.* at 325-26. Although the Goldsboro district alleged that Wayne County had established "white haven" schools, the district court found that the Wayne County school district built only one school during the period in question, to replace a sixty-year old school building. Here, PCSSD built nearly a dozen schools during the relevant period, and the district court found specifically that "the selection of sites for new schools built after the entry of the *Zinnamon* decree has been made without any consideration for the impact such selection would have on desegregation." 584 F. Supp. at 336-37. *See also id.* at 346.

Further, in *Goldsboro*, there was no showing that any government official or agency had ever opposed the location or construction of public housing within the Wayne County school district. 745 F.2d at 327. Moreover, there was no history of interdistrict transfers for segregative purposes, no district court finding of segregative annexations or boundary changes, nor any evidence of school district failure to comply with desegregation decrees.

III. THE REMEDY.

A. Proposed Remedies.

From July 30, 1984, to August 2, 1984, the district court reopened the hearings to consider the appropriate remedy for

interdistrict violations.[17] At the hearings, PCSSD and NLRSD each offered an alternative.

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[17] The State Board, NLRSD and PCSSD argue on appeal that they were deprived of procedural due process in the course of the proceedings before the district court. We reject this contention.

The State Board argues that it was deprived of due process because the district court entered further findings on the State Board's liability in the remedial order, after the court had said it had concluded all proceedings concerning liability. We find no error in the district court's clarification of the State Board's liability. All findings by the district court concerning the State Board in the remedial order have substantial support in the record of the liability hearings, at which the State Board had a full opportunity to be heard.

NLRSD's several due process objections are similarly unpersuasive. It argues that the district court improperly ordered consolidation at the conclusion of the liability proceedings while limiting the remedial hearing solely to the question of the proper *means* of consolidation. We conclude that any possible problems with the scope of the remedial hearings were cured when the district court reopened the remedial proceedings and heard testimony on alternative remedies. NLRSD complains that it was deprived of the opportunity at the reopened proceedings to cross-examine LRSD's experts, but a careful review of the record shows that the district court committed no error or abuse of discretion in this regard. NLRSD, in fact, was only deprived of the chance to recross-examine LRSD's expert witness, Dr. Dentler. The record indicates that NLRSD was able to cross-examine LRSD's expert for one and one-half hours, and we conclude that the district court was fully within its discretion to deny further inquiry. (We note also that PCSSD cross-examined Dr. Dentler extensively.) None of NLRSD's other references to the record reveal improper limitation by the district court of NLRSD's opportunity to cross-examine witnesses. Nor was NLRSD improperly deprived of an opportunity to present its own expert testimony. The district court was well within its discretion in excluding NLRSD's proffered evidence concerning surveys and other testimony about the extent of interdistrict effects. NLRSD had an adequate opportunity to preser such evidence concerning the

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1. **PCSSD's Alternative.**

PCSSD submitted its plan on July 24, 1984, six days before the remedial hearing. The plan preserves the autonomy of the three county school districts and relies on the creation of a substantial number of specialty or magnet schools and "voluntary interdistrict transfers with mandatory backup." 597 F. Supp. at 1222.

PCSSD's plan calls first for the creation of a "substantial number of special schools and special program offerings . . . in each of the three present school districts," in addition to the traditional curriculum offered at "standard schools." J.D.R. at 2497. Suggested themes for specialty schools and programs in elementary schools include a gifted and talented program, a physical development program, a multi-language program, a lab school, a Piaget model school, an extended school day center, a Montessori school, a creative arts school, a personalized education program and a computer/science/math program. Junior high school themes include a gifted and talented program, visual communication, pre-international Baccalaureate program, physical development, arts program, ecology and environmental education, and math/science. Senior high school themes include college prep high school, high school for the performing arts, law enforcement program, engineering, communications, math/science, military academy, computer technology and

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scope of the violations at the liability hearings, and the district court properly limited the scope of the remedial hearings to alternative remedial plans.

PCSSD raises similar due process complaints which we reject as well. Any concern with the district court choosing consolidation as the appropriate remedy in its order at the conclusion of the liability proceedings was alleviated by the opportunity to present remedial alternatives. Moreover, the district court's findings concerning liability were sufficient to allow PCSSD to present remedial alternatives which would address the scope of the violations.

business, electronics, drafting, ecology and environmental education, and a gifted and talented program.

PCCSD's plan requires all students in the three districts to choose the school they wish to attend, selecting from among any of the schools in the three districts. Students who do not receive their first or second choice of school due to oversubscription are to be "mandatorily assigned [to another school] by an interdistrict administrative committee composed of administrative personnel from each of the three districts."

Enrollments are to be controlled "to racially balance all schools in each of the controlled three districts at proportions approximating that of countywide public school enrollment in the preceding school year. . . . Specialty schools and specialty programs will be racially balanced at the countywide proportion plus or minus five percentage points." J.D.R. at 2506-07. Individual racial balance goals are proposed at "remote schools" with a minimum requirement by 1988-89 so that no less than fifteen percent of the remote school enrollment will be black. To facilitate interdistrict transfers, several policies are proposed, including the "effective schools" model and uniform grade structure including kindergarten, uniform grading, attendance and discipline policies.

PCSSD proposes that the three districts share vehicle capacity, routing and supervision of the transportation system, that they consider the joint contract purchase of a computerized routing and scheduling system, and the purchase of identical vehicles, the joint purchase of fuel and parts, the sharing of repair facilities and enforcement of common regulations. J.D.R. at 2509. Its plan requires that the costs associated with interdistrict assignment of students be shared by all three districts in an equitable manner and that districts receiving students from another district be reimbursed on a per capita basis. J.D.R. at 2511. It notes that, although transportation costs should be shared, financial support from the state must be made available. *Id.*

PCSSD also proposed the formation of several tri-district committees which would discuss cooperative ventures in several areas such as food preparation and delivery and maintenance service. Under this proposal, the three district controllers would meet in committee to discuss details of cost sharing and to explore other areas of financial cooperation, including establishment of a single millage rate in Pulaski County, coordinated millage campaigns, coordinated marketing of revenue bonds, common audit and accounting procedures, joint proposals for special grant or project funds, and joint bidding and purchasing practices. PCSSD would require the formation of a similar committee to "formulate and suggest criteria for the opening and closing of facilities as well as for renovating or expanding existing schools." Under its proposal, it would appear that the committees would be bi-racial.

PCSSD proposes that faculty from all three districts be recruited to teach in the specialty schools, and that teachers accepting interdistrict assignments maintain contractual relationships with their home districts but that they be subject "to all other rules and procedures applicable to the schools in which they teach." PCSSD also proposes interdistrict cooperation on a variety of personnel matters.

PCSSD's principal objection to the consolidation remedy ordered by the district court is that it destroys the institutional strengths of an ongoing school district and impedes local control of public schools. *See Milliken* v. *Bradley*, 433 U.S. 267, 280-81 (1979) (*Milliken II*).

PCSSD argues that its plan "would represent a strong step forward both in raising the quality of education for all and in improving the prospects for a permanently viable, racially integrated-system of public schools throughout Pulaski County." J.D.R. at 2517. The district court found, however, that PCSSD's plan places "undue reliance on voluntary transfers . . . [and] fails to adequately address the interdistrict segregative effects found to exist and cannot be approved." 597 F. Supp. at 1223.

2. NLRSD's "Masem/Western Wedge" Alternative.

Shortly before the July 30, 1984, remedial hearing, NLRSD submitted a statement which argued that consolidation of the three districts exceeds the scope of the interdistrict violations found by the Court, and, particularly, those attributable to NLRSD, but that "NLRSD believes that the deannexation violation of the Pulaski County School District requires remedy. A fair and equitable remedy would be to adopt a 'western wedge' concept similar to that proposed by Dr. Paul Masem in Intervenor Joshua Exhibit Number 2, Option A." J.D.R. at 1788.

The "Masem/Western Wedge Plan" calls for all three districts to retain their separate and autonomous identities. The boundaries of NLRSD would remain unchanged, but the boundaries between LRSD and PCSSD would be changed to "compensate for the loss of approximately 4,000 white students to the Little Rock School District caused by [PCSSD's] deannexation violation." J.D.R. at 1787-88. PCSSD north and west of Interstate 30 and south of the Arkansas River would become part of LRSD. LRSD east and south of Interstate 30 would become part of PCSSD. As a result of the proposed boundary changes, "the racial composition of the districts, not counting student transfers between districts, will be as follows:

Pulaski County		
Special School District	69%(W)	31%(B)
Little Rock School District....	46%(W)	54%(B)
North Little Rock		
School District	64%(W)	36%(B)

NLRSD proposes an interdistrict magnet school program and an interdistrict majority-to-minority (m-to-m) student transfer program to promote desegregation in the three districts. Ten to twelve magnet schools, which would offer programs such as computers, math and science and back-to-basic fundamental schools, would be located in central Little Rock. The m-to-m program would provide transportation between all Pulaski County schools within some maximum travel time such as thirty to forty-five minutes. Each school

in Pulaski County with less than thirty percent black enrollment would set aside seats for transfer students, with priority for Little Rock black students.

An Interdistrict Policy Board, with representatives from each district and from the Joshua intervenors, would be established to administer and coordinate the various provisions of the plan. The Board would receive funding from each of the three school districts, and it would establish a citizens' advisory board to channel community input and participation.

NLRSD's plan also calls for compensatory and remedial programs in all three districts to increase the educational achievement of black students. The Interdistrict Policy Board would hire outside consultants to ensure that all three districts have adequate compensatory programs.

The district court rejected the NLRSD plan on the ground it "places too much reliance upon the voluntary motivations of the county patrons [and] there are insufficient incentives . . . to expect the [interdistrict] transfers . . . to be successful in desegregating[.]" 597 F. Supp. at 1223. The court concluded that "the NLRSD plan fails to adequately address the interdistrict constitutional violations found by the Court[.]" *Id.*

3. The Joshua Intervenors' Alternative.

The Joshua intervenors did not advance a particular plan but presented a position statement in favor of consolidation but which was critical of several aspects of LRSD's consolidation plan. Their expert witness, Dr. Paul Masem, testified about three plans for remedying the inter- and intradistrict violations short of consolidation. These plans were primarily concerned with alterations in the present boundaries of the three districts. The district court rejected the options on the ground they would not "adequately remedy the constitutional violations found by the Court." 597 F. Supp. at 1224.

4. The LRSD Alternative.

The district court determined that LRSD's plan was the only proposal which would adequately address the interdistrict and intradistrict violations which were established at trial.

The principal component of the LRSD plan is consolidation of the three school districts. This plan utilizes a geocoding process of arriving at student assignment areas, and it divides Pulaski County into six subdistricts. The plan establishes a racial composition standard of (+) or (–) twenty-five percent of the racial makeup of the student population. To facilitate student transfers, the schools are to be of equal quality and grade structure.

LRSD's plan also calls for the creation of magnet schools at Metropolitan Vocational High and in areas populated primarily by blacks. The plan calls for desegregation of administrative staff at all levels and in all units. It provides for an interim board of directors which will select a qualified school superintendent. The court stated that it would soon set the date for an election of persons to replace the interim court-appointed board. The court also determined that, after study by the new superintendent and the interim board, a determination would be made as to the millage rate to be uniformly applied within the consolidated district.

The court also directed the three districts to hold at least three public meetings in their districts to explain the consolidation plan and to accept constructive criticism. The court then determined that it was premature to address the concerns of the Knight intervenors with respect to faculty assignments because many potential contract problems should first be dealt with by the interim boards.

Finally, the court reiterated that the state had taken actions and inactions over the years which "had an interdistrict effect upon the Little Rock, Pulaski County and North Little Rock school districts." 597 F. Supp. at 1228. "Other branches of the state, as set forth in the court's earlier

opinion . . . share responsibility with the State Board for these constitutional violations, but the State Board must be the remedial vehicle for their violations as well[.]" 597 F. Supp. at 1228 (citations omitted). The court then stated that it would detail the "precise nature of these financial and oversight obligations" at a later date. *Id.*

B. The Required Remedy.

Having found interdistrict violations by the state and defendant school districts, and having heard from all of the parties concerning the remedial alternatives, the district court was responsible for devising a remedy that would correct the constitutional violations that it found. A federal court has broad equitable power to devise a desegregation remedy. The overriding goal of such a remedy is to eradicate all vestiges of state-imposed segregation. *Swann* v. *Board of Education*, 402 U.S. 1, 15-16 (1971); *Green*, 391 U.S. at 437-38. Three equitable principles guide the courts in this process: (1) the nature of the remedy is determined by the nature and scope of the violation; (2) the remedy must, to the greatest degree possible, be designed to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct; and (3) the courts must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution. *Milliken II*, 433 U.S. at 280-81.

In constructing a desegregation remedy, a court may not rigidly require a particular racial balance. *Pasadena Board of Education* v. *Spangler*, 427 U.S. 424, 436-38 (1976); *Milliken I*, 418 U.S. at 739-40; *Swann*, 402 U.S. at 22-25. Nevertheless, the Supreme Court has made it clear that the awareness of the racial composition of a school district or school districts is a useful starting point in developing an effective remedy, and thus the limited use of racial ratios is within the Court's equitable discretion. *Swann*, 402 U.S. at 25.

Thus, the Supreme Court has approved a remedy imposed by the district court requiring that all schools in the school

district be roughly within the same racial balance. *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 455 n.3 (1979); *Swann*, 402 U.S. at 23-25. Our Court has consequently approved the use of flexible ratios in desegregation remedies on numerous occasions. *E.g., Liddell* v. *State of Missouri*, 731 F.2d at 1302 & n.7; *Clark* v. *Board of Education of Little Rock*, 705 F.2d 265, 269 & n.6 (8th Cir. 1983); *Liddell* v. *Board of Education of St. Louis*, 667 F.2d 643, 649 & n.6 (8th Cir. 1981); *Adams* v. *United States*, 620 F.2d 1277, 1296 & n.30 (8th Cir. 1980); *Morrilton School District No. 32* v. *United States*, 606 F.2d 222, 230-31 (8th Cir. 1979); *Booker* v. *Special School District No. 1*, 585 F.2d 347, 353-55 (8th Cir. 1978); *United States* v. *School District of Omaha*, 521 F.2d 530, 547 (8th Cir.), *cert. denied*, 423 U.S. 946 (1975). In any event, in this case, we have closely tailored the remedy to the violations and we are not requiring a particular racial balance in each district.

We sustain the district court's holding that the interdistrict violations by the defendants justify interdistrict relief to the extent noted below. The more troublesome question is whether the district court erred in holding that consolidation was the only remedy that would effectively cure the interdistrict violations. We hold that the district court erred in that regard. In so holding, we express our agreement with the district court that consolidation would be a cost-effective and efficient method of desegregating the three school districts, but under *Milliken I*, we cannot require that remedy unless it is essential to correct a constitutional violation.

For three reasons, we do not believe we can require consolidation. First, that remedy exceeds the scope of the violations. It was based in part on the finding that the school districts were not autonomous, and we have held that that finding is not supported by the evidence. To be sure, the three districts did cooperate with each other through the late 1960's to maintain a dual school system in each of the districts, but each district retained its own identity, elected its own school board, fixed its own budget, hired its own faculty and staff, developed its own transportation system,

constructed its own schools, and either agreed or disagreed to proposals to annex or deannex sections of its district to another.[18]

Second, other remedial measures are better designed to restore the victims of segregation in the Pulaski County Schools to the position they would have occupied absent discriminatory conduct. Thus, the violations relating to annexations and deannexations, segregated housing, school siting, student assignments, special education, transportation, employment of faculty and administrators, and black participation in school affairs can all be corrected by the carefully tailored guidelines for a remedy to be established by the district court as set forth below.

Third, the remedy we have set forth preserves the important interests the three school districts have in managing their own affairs. As the Supreme Court stated in *Milliken I*, "the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our county. . . . Local autonomy has long been thought essential both the maintenance of community concern and support for public schools and to the quality of the educational process." *Milliken I*, 418 U.S. at 741-42.

In the light of the above circumstances, and the requirement that our remedy be closely confined to one that will remedy violations found to exist, we remand to the district

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[18] Additionally, the district court, in reaching its decision that the districts were not autonomous, gave weight to the fact that many white students transferred from PCSSD to NLRSD and LRSD in the period from 1954 to 1973, and that tuition in most instances was paid for by the sending to the receiving district. We do not feel that these transfers constitute sufficient evidence to establish a lack of autonomy.

court with directions to modify its remedy[19] to embody the following principles:

> 1. Each school district shall remain independent with an elected school board with its own administrative structure and powers of taxation.
>
> 2. The boundaries of NLRSD are to remain as they are at the present time. This is in partial recognition of the fact that the nature and extent of its interdistrict violations are less severe than those of the other defendants. Moreover, the black-white school population of this district approximates that of the county as a whole. Little or no good purpose would be served by changing its boundaries. The NLRSD, however, shall be required to correct each of the constitutional violations found by the district court, and to comply fully with the prior orders of the district court and this Court. It will thus be required to make the necessary modifications to its student assignment plan, the employment of black administrators and principals, and the adoption of

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[19] 28 U.S.C. § 2106 provides, in pertinent part:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review[.]

Appellate modification has been described as an "inherent ability," *Petition of U.S. Steel Corporation*, 479 F.2d 483, 500 (6th Cir. 1973), 414 U.S. 859 (1974), which this Court has exercised on several occasions, *e.g.*, *In Re Thompson*, 642 F.2d 227, 229 (8th Cir. 1981) (en banc). The Fifth Circuit has exercised its authority under this section to modify district court remedies in school desegregation cases. *Conley* v. *Lake Charles School Board*, 434 F.2d 35, 39 (5th Cir. 1970); *Ross* v. *Dyer*, 312 F.2d 191, 194 (5th Cir. 1963); *Bush* v. *Orleans Parish School Board*, 308 F.2d 491, 503 (1962).

a racially neutral plan evaluating and placing students requiring special education. It will also be required to cooperate in the interdistrict aspects of the remedy outlined herein.

3. The district court, after a hearing, shall adjust the boundaries between PCSSD and LRSD as follows:

> (a) All land within the City of Little Rock shall be assigned to LRSD, and the students living in that area shall be assigned to schools in LRSD.[20]
>
> (b) All land in the Granite Mountain area will be included in PCSSD, and the students living in that area shall be assigned to schools in PCSSD. The record is not clear as to the precise boundaries of this area, thus evidentiary hearings will be held by the district court to determine them. It is the intent of this Court that the boundaries of this area shall reasonably reflect the area that was impacted by the 1953 deannexation of land from PCSSD to LRSD.
>
> (c) In lieu of the adjustments indicated in (a) and (b), the district court, upon application by a party to this appeal, may conduct evidentiary hearings to determine whether adjustments other than those

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[20] This remedy is based on all of the defendants' interdistrict violations outlined in this opinion, including the violations relating to school sitings, annexations and deannexations, lack of any low-income public housing in PCSSD, student assignments, special education, transportation, employment of faculty and administrators, as well as the pre- and post-*Brown* interdistrict transfers and the other historical violations with continuing effect.

indicated in (a) and (b) would have substantially the same impact on the student populations of each district and would better meet the educational needs of the students of the districts involved. After such hearings, the district court may make adjustments to the boundaries other than those indicated above if it finds that they would better meet the educational needs of the students, and would remedy the constitutional violations to the same extent as the adjustments in (a) and (b).

4. After the boundaries between LRSD and PCSSD have been adjusted, each school district as reconstituted shall be required to revise its attendance zones so that each school will reasonably reflect the racial composition of its district. Consistent with earlier district court orders with respect to these schools, school districts may, where necessary, be permitted to depart from this remedial guideline in that school enrollments may over- or underrepresent blacks or whites by as much as one-fourth of the remedial guideline for either race. We see no reason why, on this record, the variance should exceed this level. *See Columbus*, 443 U.S. at 455, n.3; *Swann*, 402 U.S. at 23-26. If the four all- or nearly all-black elementary schools as conditionally allowed by this Court in *Clark* v. *Board of Education of Little Rock*, 705 F.2d 265 (8th Cir. 1983), are retained in LRSD, compensatory and remedial programs of the type that we required for the nonintegrated schools in St. Louis shall be put into effect for the four schools. *See Liddell* v. *State of Missouri*. 731 F.2d at 1312-18. The additional cost of these programs shall be paid for by the State of Arkansas.

The district court may also consider the special problem of a few remote schools in Pulaski County. The June 4, 1973, decree of Judge J. Smith Henley permitted PCSSD to deviate from the racial standards that he established for the school system by allowing deviation from the standard in one or two schools distant from the black community. The district court should consider whether the exception granted by Judge Henley should be permitted to continue.

5. Voluntary intra- or interdistrict majority-to-minority transfers shall be encouraged, with the State of Arkansas being required to fund the cost of transporting students opting for interdistrict transfers and to pay benefits to the sending and receiving schools for the interdistrict transfers similar to those required to be paid in *Liddell*. All three defendant school districts in Pulaski County shall be included in this program. To facilitate these transfers, the proposals of the PCSSD for "effective schools model," uniform grade structures, grading, attendance and discipline policies shall be carefully considered.

6. The district court may require a limited number of magnet or specialty schools or programs to be established at locations to be determined initially by a Magnet Review Committee and approved by the district court after a hearing. (Both PCSSD and NLRSD have made thoughtful proposals in this regard.) The magnet schools, if ordered, shall be administered by a Magnet Review Committee with one person to be named by each school district and two persons to be named by the State of Arkansas. The State of Arkansas will be required to pay the customary state aid to any pupils attending these schools, plus an additional one-half of the cost of educating the students

attending them. The local share of the cost of any magnet school established shall be paid by the three participating schools on a basis to be determined by the district court. The state shall also be required to pay one-half of the cost of the construction or rehabilitation necessary to house the magnet schools and the full cost of transporting any students who attend them. *See Liddell VII*, 731 F.2d at 1309-12.[21]

7. PCSSD's proposals with respect to cooperative programs set forth on pages 49-51 of this opinion should be seriously considered by the district court and implemented where feasible.

8. If the boundary changes result in PCSSD or LRSD losing a substantial portion of their tax bases, the district court shall consider measures to equalize the tax rates in these districts. The court may also consider whatever other financial measures it or the parties consider necessary, including retirement of bond issues, to ensure an equitable transfer of benefits and obligations accompanying the boundary changes and the corresponding transfer of physical plant and related debt.

Each party to this appeal is to bear its own costs, with the exception of the Joshua Intervenors, whose costs will be borne equally by the State Board, LRSD, PCSSD and NLRSD.

This action is remanded to the district court for further action consistent with this opinion.

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[21] On the basis of *intra*district violations in *Liddell*, this Court ordered the State of Missouri to pay for programs similar to those described in paragraphs 5 and 6. *Liddell* v. *State of Missouri*, 731 F.2d 1305-12. Thus, even if there were no interdistrict violations in this case, on the basis of intradistrict violations by the state, this Court may order a similar remedy against the state.

ARNOLD, Circuit Judge, concurring in part and dissenting in part.

I.

I agree with much of the Court's able opinion. In particular, I approve completely of its decision not to order consolidation of the three school districts now operating in Pulaski County, Arkansas. Consolidation would mean destruction of three popularly governed units of local government, and substitution in their stead of one judicially created and judicially supervised school district. Such a remedy is well within the judicial power of the United States, and I should not hesitate to support it upon proper proof, but the proof here is insufficient for several reasons, the most important of which is that the remedy of consolidation "exceeds the scope of the [parties' constitutional] violations." *Ante* at 56. Consolidation is a drastic step that should be reserved for clearer cases.

Having rejected consolidation, the Court proceeds to analyze the record and set out a detailed remedial decree, to be administered by the District Court on remand. The relief ordered today differs greatly from that ordered by the district Court. If we are not prepared to affirm what that court has done, we should remand this case for further findings and a detailed remedial decree. Although we have *power* to modify a decree at the appellate level, it is unwise to exercise that power. The District Court (though we are today disagreeing with some of its conclusions) is presided over by a scholarly and distinguished judge. That court, not this one, is in the best position to write a decree. Instead, a decree today springs full-grown from the brow of this Court, a decree that will, I dare say, startle all the parties to this case, including even those (if there are any) who like what they see.

Since the Court has decided to award detailed relief at the appellate level, however, it is appropriate for me to indicate

in what respects I agree with its opinion. I agree that the District Court's findings of intradistrict violations on the part of the North Little Rock School District (NLRSD) and the Pulaski County Special School District (PCSSD) are not clearly erroneous and should be affirmed. These violations should be corrected. Moreover, the Court properly declines to change the boundaries of NLRSD. Its constitutional defaults have not been shown to have any significant current interdistrict effect. It is also appropriate to order compensatory and remedial education programs for the four virtually all-black schools that we allowed in the Little Rock School District (LRSD) in *Clark* v. *Board of Educ. of the Little Rock School District*, 705 F.2d 265 (8th Cir. 1983). (A similar remedy might also be in order for some racially identifiable schools in NLRSD and PCSSD.) The State of Arkansas should pay for these programs. The State's long-continued violation of the Fourteenth Amendment has played a significant part in bringing about this *intra*district condition of racial isolation.[1] Some other aspects of the Court's remedy, for example, voluntary transfers, either intradistrict or interdistrict, of students from schools where they are in a racial majority to those where they are in a minority, seem unobjectionable.

The Court directs that the boundary between LRSD and PCSSD be adjusted so that all land within the City of Little Rock shall be assigned to LRSD. It also directs the retransfer of the Granite Mountain area to PCSSD. And,

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[1]The State argues that we cannot require it to spend more money in one school district than another, because to do so would conflict with a recent opinion of the Supreme Court of Arkansas requiring, under the State Constitution, substantially equal per pupil funding throughout the State, *DuPree* v. *Alma School Dist. No. 30*, 279 Ark. 340, 651 S.W.2d 90 (1983), and with a statute implementing this opinion, Ark. Stat. Ann. §§ 80-850.10—80-850.22. This argument is insubstantial. Under the Supremacy Clause, U.S. CONST. Art. VI., cl. 2, the Fourteenth Amendment overrides any inconsistent state statute or constitutional provision.

wisely, the Court's opinion leaves it open to any party, on remand, to move the District Court to make different boundary-line adjustments, so long as they have substantially the same impact on the student populations of each district. I concur in the result reached by this portion of the Court's opinion, though for reasons somewhat different from those it gives. In my view, PCSSD's constitutional violations, when considered as a whole, have had some interdistrict effect, and the boundary changes ordered by this Court are a fair approximation of the measures necessary to undo that effect. There is necessarily some imprecision in this reasoning, and it rests as much on inference as on direct evidence, but it is not unfair for the risk of erroneous decisionmaking that this kind of imprecision creates to fall, at least in part, on those who have violated the Constitution. In reaching this conclusion I am heavily influenced by expert testimony that the District Court believed, and that, accordingly, we are also obliged to accept under the clearly-erroneous rule.

From the remaining features of the Court's remedy, especially its imposition of large financial responsibility on the State of Arkansas for the construction and operation of magnet schools, I respectfully dissent.

II.

One fact stands out after a reading of the District Court's and this Court's opinions: LRSD has more black students than either NLRSD or PCSSD. In the school year 1983-84, LRSD's enrollment of 19,052 was about 69% black and 31% white, Tr. 1448, while PCSSD's enrollment of 27,839 was about 22% black and 78% white, PCSSD X 64, Table 1. LRSD's black percentage has been growing steadily, and one senses that the major impetus behind the District Court's decision to order consolidation is a determination not to permit LRSD to become all black, or virtually so. As a policy matter, I agree that such a result is desirable. An all-black district may have problems raising adequate funds

from the property tax, since most voters in the district will still be white, whatever the makeup of the public schools' student body. It is also true that both black and white students benefit, socially and educationally, from exposure to each other.[2] These facts, certainly relevant in a legislative sense, are less directly so in the present judicial context. Our task as judges is not to force these school districts to do what we think is right or socially good, but to apply the law to the facts and announce the result, whatever it may be.

Analysis must start with the governing legal standard laid down by the Supreme Court. It is stated in *Milliken* v. *Bradley*, 418 U.S. 717 (1974) (*Milliken I.*):

> The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann*, 402 U.S., at 16. Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In

[2]The proposition that all-black schools or classrooms are necessarily educationally inferior, however, is quite a different thing, and I do not subscribe to it. The "blacker" LRSD, ironically, appears by all accounts to produce more scholars of note and to offer a broader selection of courses, than the "whiter" districts with which it wishes to merge.

> such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.

418 U.S. at 744-45. The Supreme Court also tells us that no particular degree of racial balance is required by the Constitution, *id.* at 740; that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools," *id.* at 741; that "[t]he constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district," *id.* at 746; and that "[t]he suggestion . . . that schools which have a majority of Negro students are not 'desegregated' . . . finds no support in our prior cases," *id.* at 747 n.22.

I also find significant the Supreme Court's summary of the reasoning of the lower courts whose decisions it was reviewing:

> Viewing the record as a whole, it seems clear that the District Court and the Court of Appeals shifted the primary focus from a Detroit remedy to the metropolitan area only because of their conclusion that total desegregation of Detroit would not produce the racial balance which they perceived as desirable. Both courts proceeded on an assumption that the Detroit schools could not be truly desegragated—in their view of what constituted desegregation—unless the racial composition of the student body of each school substantially reflected the racial composition of the population of the metropolitan area as a whole.

418 U.S. at 739-40.

A.

Applying this standard, I look first at the constitutional violations attributed to PCSSD. That such violations have occurred, both before and after the desegregation decree entered against PCSSD in the *Zinnamon* case, I do not doubt. Perhaps most shocking is the fact that current PCSSD board members, far from being familiar with the *Zinnamon* decree, had not even read it when they testified in the District Court. But the question for present purposes must be, what is the *current* interdistrict effect of these violations? See *Goldsboro City Bd. of Educ.* v. *Wayne County Bd. of Educ.*, 745 F.2d 324, 330-31 (4th Cir. 1984); *Lee* v. *Lee County Board of Education*, 639 F.2d 1243, 1260 (5th Cir. 1981). Have they caused more white children to come to PCSSD schools, or black children to leave or avoid them, than would otherwise have been the case? If so, to what extent? These questions must be answered, else the remedy will not fit the violations, nor the punishment fit the crime.

1. A great deal of stress is laid upon the fact that, before the *Brown* decision and for a time thereafter, the education provided by PCSSD for black children was grossly inferior to that provided for white children in PCSSD and to that provided for all children, black and white, in LRSD. As a consequence, some black children came to LRSD to go to school who would not otherwise have been there. But what current effect is this movement, much of which dates from 50 years ago, having? If black students came to LRSD for an education, and then went back home or elsewhere to work and raise their families, obviously their migration would not now be producing any current effect on the racial character of the LRSD student body. It is true that if black parents moved to LRSD and remained there, their descendants might now be attending LRSD schools. The Court appears to have this sort of movement in mind when it says that "[s]ome black families moved from the county to Little Rock because of the disparities in educational opportunities," *ante* at 25, but the record reference cited for this statement, J.D.R.

915-19, in fact contains no support for it.[3] The transfers that did occur appear to be principally of students moving into LRSD, without their parents, to live with a relative. One of LRSD's own witnesses testified, Tr. 116, that this kind of movement of students into LRSD ceased in the 1950's, when state laws requiring school children to be domiciled in the district where they were going to school began to be strictly enforced.[4] In addition, any movement of black families into Little Rock that did occur must have been, to some extent, simply a part of the larger phenomenon of poor people leaving the farm to seek opportunity in the city.

2. The Court stresses that historically, that is, when PCSSD was first formed, it was the intention of LRSD and PCSSD to expand the boundaries of LRSD *pro tanto* every time the City of Little Rock annexed additional territory, so that the City and LRSD would continue to be coterminous. This intention has not been adhered to: the City has annexed a good deal of territory that has remained within PCSSD and not been transferred to LRSD by "deannexation." But only if PCSSD has declined to transfer territory to LRSD for racial reasons, in order to keep itself "white" and LRSD "black," would this failure to "deannex" justify interdistrict

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[3]Some white students also transferred to LRSD seeking a "city school education." PCSSD X 51, at p. 62; Tr. 118 (LRSD's witness); PX 36. It was not just black schools in LRSD that were superior. All schools there were regarded as better, and this is hardly sinister or suprising, since Little Rock is the only true urban center in Arkansas and is much richer than many of the other school districts.

[4]The Court seems to agree that significant interdistrict movement of students stopped 20 years ago. *Ante* at 20. And even in the days when it was occurring, it was not simply a matter of black students transferring into LRSD. Between 1953 and 1963 more whites than blacks transferred from PCSSD to LRSD. PX 36. Some of the specific figures are instructive: In 1953-54, 47 black and 223 white children transferred from PCSSD to LRSD; in 1956-57, 42 black and 254 white; and in 1959-60, 34 black and 363 white. Tr. 133-34 (LRSD's witness).

relief. (No one claims that school-district lines were drawn *initially* for racial reasons: back in 1927, when PCSSD was formed, segregation was not thought to be unconstitutional, and no one needed to gerrymander school-district boundaries to preserve it. The claim is, rather, that the PCSSD-LRSD line was *maintained* for racial reasons.)

There have been eight separate transfers of territory from PCSSD to LRSD (and apparently none from LRSD to PCSSD). Of these eight transferred areas, seven have been predominantly white. Tr. 948-49. This is hardly the action of a school district seeking to maintain its "whiteness." (The exception is the Granite Mountain area, deannexed in 1953, of which I shall speak hereafter.) The Court's point, though, is a bit different: it charges that when it became clear that some real desegregation was going to take place, the boundaries hardened. Dr. Robert A. Dentler, LRSD's principal expert witness, made the same point. "[T]he County I found had decided in its Board of Directors to make a formal policy of no further deannexations in 1968. . . . " Tr. 343. This new policy, the Court now infers, was based on racial animus, a desire to keep the black percentage in PCSSD down.

In fact, the PCSSD Board voted, on May 14, 1968 (and LRSD now concedes this) *in favor of* the concept of consolidation with LRSD. Floyd Parsons, Superintendent of LRSD from 1962 to 1971, confirms that during his time in office PCSSD, the poorer district, consistently sought consolidation. It was LRSD that opposed it, and not for racial reasons, either, but simply because it did not want to take on the additional financial responsibility of educating PCSSD's students. Tr. 1131-32 (testimony of Mr. Parsons, called by LRSD).[5] It is true, therefore, that no deannexations have taken place since 1968, but to blame this on PCSSD's desire not to increase its black student percentage is not plausible.

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[5] Mr. Parsons also testified that he knew of no movement of white students from LRSD to PCSSD. Tr. 1142.

3. In many other respects, however, PCSSD has fallen short of its constitutional obligations, or at least the District Court has not clearly erred in so finding. It cooperated with LRSD and the State in transferring to LRSD the racially segregated Granite Mountain housing project (to be discussed in more detail later). It is imposing upon black students an unfair proportion of the burden of busing for purposes of desegregation, it is not meeting its goals for the hiring of black teachers, it is assigning black students disproportionately to the classification of educably mentally retarded, and it has failed to comply with requirements in the *Zinnamon* decree that a Bi-Racial Committee be established and that two black citizens serve as ex officio members of the school board. And, perhaps most important for present purposes, PCSSD has, in violation of the *Zinnamon* decree, located new schools in white neighborhoods or in places inconvenient to black students, and maintained a number of schools whose racial makeup falls outside the limits specified by the decree. These factors, especially the school-siting decisions, naturally affect the movement of students and families. PCSSD has thus violated not only the *Zinnamon* decree but also the Supreme Court's direction in the *Swann* case, 402 U.S. at 20-21, that new schools not be located "in the areas of white suburban expansion, farthest from Negro population centers."

I believe these factors are having a substantial current interdistrict effect. The record contains expert testimony, and it is not implausible, that these constitutional violations, considered together, are making PCSSD "whiter" and LRSD "blacker" than they otherwise would have been. I have indicated why I do not believe that PCSSD's violations have actually caused any substantial degree of white movement from LRSD to PCSSD, or of black movement out of PCSSD. But another kind of movement—that of families coming from outside the entire Pulaski County area—has, I believe, been substantially influenced. (This sort of movement was referred to by one of the experts as "white overflight.") The pro-white emanations that PCSSD has given off over a

period of years, if I may use such a metaphor, have, it seems, been a substantial factor attracting white parents, especially since those parents could, as the lines are now drawn, move into PCSSD without being outside the City of Little Rock. The boundary change ordered by the Court (making LRSD and the City coterminous) would make LRSD 60% black and 40% white, *ante* at 27, instead of 70% black and 30% white. This 10% change seems a fair approximation of what the racial percentages would have been absent the influence of PCSSD's violations. I therefore concur in the Court's decision to adjust the LRSD-PCSSD boundary line to this extent.

B.

The Court holds that the State of Arkansas has committed constitutional violations that are producing substantial interdistrict effects. It therefore awards interdistrict relief against the State, in the person of the State Board of Education. I quite agree that the State of Arkansas has been, in this field, a persistent violator of constitutional rights. I cannot agree that these violations (with one exception) are responsible for the racial disparity now existing between PCSSD and LRSD, or that they justify (again with an exception) interdistrict relief against the State.

1. The Court recounts in detail the manifold sins and omissions of the State of Arkansas in this field. There is no point in denying the history set out in the Court's opinion. In particular, for many years the State, although professing adherence to the "separate but equal" doctrine that was then the law of the land, in fact maintained schools that were separate and unequal, and the black people of the State bore the brunt of this inequality. Furthermore, from 1954 on, the Executive and Legislative Branches of State government set their faces like a flint against the law, covering themselves and the State with dishonor.[6] But what is the present legal

[6] On the other hand, the whole picture, fairly considered, is not so gloomy as the Court implies. Plaintiff's own expert

(footnote continued on next page)

relevance of these facts? To the extent that any individual school district (including the three in Pulaski County) is not fully desegregated, the State is at least partly responsible and should pay the price. It has been 31 years since *Brown* was decided, but centuries of inequality are not so soon dissipated. There is no showing whatever, however, and no claim, that the State has caused any school-district boundary lines to be drawn or maintained for racial reasons. Much of the history that the Court details, therefore, is simply irrelevant to the question of interdistrict relief in the present case.

2. The point is made that the State Board of Education is, by statute, given extensive powers, including general supervision over all public schools in the state, Ark. Stat. Ann. § 80-113, and the approval of plans and expenditures of public-school funds for new school buildings, Ark. Stat. Ann. §§ 80-113, 80-3506. These statutes have never been interpreted to give the State Board of Education the sort of wide-ranging supervisory power this Court attributes to it. Instead, local school boards, except for certain legal and financial aspects of their operations, have been almost completely autonomous. See Ark. Stat. Ann. § 80-509, listing in comprehensive detail the powers of local boards. Decisions, for example, as to where to locate schools have always been treated as the prerogative of local boards. They have chosen the sites, Tr. 776, and the State Board of Education has never claimed the authority to overrule a district's decision on where to build a school, Tr. 788. Rather, the statement in § 80-113 that the State Board shall "approve plans and expenditures of public school funds for all new school buildings" has been interpreted to authorize the State Board to review local decisions only to make sure that plans meet recognized construction standards and that proposed

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(footnote continued from preceding page)

witness on the history of school desegregation in Pulaski County testified that "Little Rock a few years after 1959 was far more integrated . . . than many cities in the North where I grew up." Tr. 103.

methods of financing are legally and fiscally sound under the statutes of the State limiting school districts' bonded debt. Tr. 775. Both the State Board and local school districts have so construed the statute at least since 1931. There is no evidence that the State Board has ever purported to review school-siting decisions, either for desegregation or for any other purposes. It is therefore unfair to blame the State for PCSSD's violations of the siting provisions of the *Zinnamon* decree.

It is true, as the Court says, that the State Board of Education's efforts to assist and encourage desegregation have been too little and too late (though I suspect that it is entitled to somewhat more credit than the Court gives it).[7] But again, what is the relevance of this fact to the specific interdistrict relief contended for in the present case? If the State Board of Education had diligently fulfilled its duty to encourage desegregation, would the boundary line between LRSD and PCSSD be located in a different place from where it now is? Would the racial distribution of students between those two districts be different from what it now is? I do not believe that the record supports any definite answer to these questions. I repeat that the State's defaults would fully justify compelling it to participate in an *intra*district remedy. But that is not what this case, at least primarily, is about.

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[7] In 1966, for example, the State Board did create a specific position to work with local boards in the desegregation process. This position was paid for out of the State's own funds, not federal funds. Tr. 784-785. The State did not apply for federal desegregation funds. Instead, the Arkansas Technical Assistance Center, a private organization sponsored by Ouachita Baptist University, applied for and received Title V federal funds to assist school districts in desegregating. "The decision was made . . . that those funds could be expended probably more efficiently if it were in any agency . . . that was not subject to politics and pressures." Tr. 804. The State Board of Education "cooperated very closely with the Center at Ouachita." Tr. 805.

3. There are certain specific respects, however, in which the State of Arkansas, with a racially discriminatory motive, actually assisted in the movement of school children across district lines. During the school year 1958-59, the schools in LRSD were closed, and many children from Little Rock attended segregated schools in PCSSD. The State paid at least part of the cost of these transfers, and I am willing to assume that many more white students than black benefited from this action. Shameful as it was, I cannot see that this episode has any continuing, current effect on the distribution of students as between LRSD and PCSSD. The LRSD schools reopened in the fall of 1959, and there is no evidence that students who attended school elsewhere in 1958-59 did not return to LRSD when they could. I would, however, on the basis of this history, agree that the State should pay for any voluntary majority-to-minority transfers between PCSSD and LRSD. That would be a fair recompense for what it did in the late fifties.

The Court suggests that the racial turmoil created by the State in LRSD in 1957 and the years immediately following has increased the percentage of black students in the district. It says, for example, that "the active intervention of the state was a central factor in delaying desegregation of the Little Rock schools until 1973, and in contributing to the increasing concentration of blacks in LRSD." *Ante* at 22-23. With the first part of this statement I can agree completely, but the second part seems to me a *non sequitur*. The idea that "state-created racial turmoil in LRSD in the 1950's fostered substantial white flight from LRSD to PCSSD and NLRSD," *ante* at 23 n.8, seems completely counterintuitive. It would be much more plausible to infer that the State's efforts to maintain segregation in LRSD made it more likely for whites, once the schools had been reopened, to remain there. Even were it correct that pro-segregation turmoil of the late 1950's somehow fostered white flight, this phenomenon ended long before the 1973 implementation of desegregation and could at most account for the increase in the percentage of black students to 48%, which was the black

percentage in LRSD in 1973. See *Clark* v. *Board of Educ. of the Little Rock School District*, 705 F.2d 265, 267 (8th Cir. 1983).

4. In one other respect, however, I believe the Court properly attributes interdistrict liability to the State. Housing authorities are creatures of the State, existing by virtue of statute, and the Little Rock Housing Authority clearly maintained and fostered racial segregation. In some cases, it might be unfair to award interdistrict relief against school districts on the basis of housing violations. A "school case, like a vehicle, can carry only a limited amount of baggage. *Swann*, 402 U.S. at 24." *Bradley* v. *School Board of the City of Richmond, Virginia*, 462 F.2d 1058, 1066 (4th Cir. 1972), *aff'd by an equally divided Court*, 412 U.S. 92 (1973). But here, PCSSD, LRSD, and the State legislature all cooperated with the Little Rock Housing Authority in respect of the Granite Mountain Housing Project, a segregated black project constructed in 1953. At that time, territory in which the housing project was to be located was transferred by a special act of the General Assembly from PCSSD to LRSD. The school districts and the State were thus directly involved in a transfer of territory on which a segregated housing project was to be built, a fact that they must have known.

This was a clear interdistrict violation, and an appropriate remedy should be devised to cure it. The Court, *ante* at 59, directs that the Granite Mountain area be retransferred to PCSSD, and leaves to the District Court on remand to determine "the precise boundaries of . . . the area that was impacted by the 1953 deannexation of land from PCSSD to LRSD." *Ibid.* I agree that this remedy, or some substantial equivalent to be selected by the District Court, see *ibid.*, is appropriate.

III.

In sum, this Court properly affirms, as not clearly erroneous, the District Court's findings of intradistrict violations on the part of PCSSD. These violations, as well as those committed by NLRSD, should be corrected. In the main,

intradistrict relief, in which the State Board of Education should be made to share, should be adequate for this purpose. I also believe that an interdistrict violation by PCSSD, LRSD, and the State has been made out in respect of the location of the Granite Mountain Housing Project, and that PCSSD's other violations justify the boundary change ordered by the Court. As to the State Board of Education, however, I would not grant any interdistrict relief, except with respect to the funding of voluntary student transfers and the retransfer of the Granite Mountain area. From the extensive additional relief granted against the State, and from the remaining remedial details ordered by this Court, I respectfully dissent.

JOHN R. GIBSON, Circuit Judge, concurring in part and dissenting in part, joined by FAGG, Circuit Judge.

Although I agree with much of what the court does today, I do not believe there is sufficient evidence in the record to support that part of the court's decision requiring that the boundary lines of the City of Little Rock and the LRSD be made coterminous. Therefore, I respectfully dissent. Furthermore, while I agree with nearly all of Judge Arnold's persuasive discussion and reasoning, I believe that his opinion likewise fails to demonstrate that there has been sufficient proof of significant interdistrict segregative effects to justify realigning the boundaries of the LRSD and the City of Little Rock.

The record makes plain, and I fully concur in the court's conclusion, that there have been substantial and in fact egregious intradistrict constitutional violations as a result of segregative acts on the part of the NLRSD and the PCSSD, the effects of which must be remedied. I also agree with the court's conclusion that the record does not reveal sufficient interdistrict segregative effects to justify consolidation of the three districts.

I further agree with the court today that the Granite Mountain transfer, which occurred in 1953, had an interdistrict segregative effect. However, I believe that the current effects of this violation are not clearly delineated either in the district court's findings of fact and conclusions of law, or in this court's conclusions today. Contrary to the court's decision today, as well as Judge Arnold's views, I believe that this issue should be remanded to the district court for more precise and specific findings as to the current interdistrict segregative effect of the 1953 transfer, and for consideration of an appropriate remedy tailored to the constitutional violation that is found to exist.

My chief concern with the opinion of the court is that it reads too broadly the principles which govern the federal equitable remedial power in *Milliken* v. *Bradley*, 418 U.S. 717 (1974) (*Milliken I*). Judge Arnold, while recognizing these principles and cogently pointing out the manner in which the court misapplied them, improperly relies upon his own factual conclusions based on an overly generous interpretation of the record to justify the remedy ordered today.

Milliken I established that an interdistrict remedy is appropriate only upon a showing of "a constitutional violation within one district that produces a significant segregative effect in another district;" specifically, that "racially discriminatory acts . . . have been a substantial cause of interdistrict segregation." *Id.* at 744-45. Further, an interdistrict remedy is appropriate only "to eliminate the interdistrict segregation *directly* caused by the constitutional violation." *Id.* at 745 (emphasis added). Two courts of appeals have read this language to require clear proof of cause and effect of a constitutional violation and a careful delineation of the extent of the effect before an interdistrict remedy may be involved. In *Lee v. Lee County Board of Education*, 639 F.2d 1243, 1256 (5th Cir. 1981), the court stated:

> We believe the Court's deliberate choice of phrases such as "substantial" or "direct cause" and "significant segregative effect" also expresses an insistence

> that in cases where an interdistrict remedy is requested, there must be clear proof of cause and effect and a careful delineation of the extent of the effect. In the absence of such a showing, school district lines are to be carefully observed and desegregation remedies confined to orders affecting the school district in which the condition of segregation is manifest.

Accord Goldsboro City Board of Education v. *Wayne County Board of Education*, 745 F.2d 324, 332 (4th Cir. 1984).

The Fifth Circuit also emphasized in *Lee* that there must be "a substantial, direct and *current* segregative effect," 639 F.2d at 1260 (emphasis in original), before an interdistrict remedy may be ordered. This argument is persuasive, for a remedy cannot be tailored to correct a condition, *Milliken I*, 418 U.S. at 738, unless it currently offends the Constitution. As the court stated in *Milliken I*: "A federal remedial power may be exercised 'only on the basis of a constitutional violation' and, '[a]s with any equity case, the nature of the violation determines the scope of the remedy.'" *Id.* at 738 (quoting *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 11, 16 (1971)). The Court reemphasized this important limitation on the federal remedial power in *General Building Contractors* v. *Pennsylvania*, 458 U.S. 375, 399 (1982), in which it cautioned that a remedial decree should "extend no farther than required by the nature and the extent of that violation."

It is also well to observe before we turn to specific issues that the court today adopts its own remedy, which has not been addressed by the parties in their arguments or briefs, and which differs substantially from that ordered by the district court. The findings of fact necessary to support this court's remedy simply do not exist. Specifically, there is no finding by the district court of a current segregative effect to support the conclusion that the boundaries of the City of Little Rock and LRSD be made coterminous.

The court, to support that portion of its discussion mandating that the boundary of the City of Little Rock and the LRSD be coterminous, simply catalogs a portion of the district court's findings in a footnote. *See ante* at 59 n.20. It must be observed, however, that the court, at least with respect to the district court's findings on student assignments, special education, transportation, and employment of faculty and administrators, simply has enumerated intradistrict violations that may require intradistrict remedies within the PCSSD. Neither this court's nor the district court's opinion indicates in any way that these *intra*district violations manifested an *inter*district effect.

Similarly, neither the opinion of this court nor the record from the district court reveals the conduct of the PCSSD which has resulted in the lack of low income housing in the PCSSD. The only exception with respect to public housing is the evidence concerning the Granite Mountain deannexation in 1953 and the role that the PCSSD may have played at that time.

The court also relies on violations relating to school sitings to justify an interdistrict remedy. These violations which are discussed at some detail in the court's opinion involve decisions by the PCSSD to build some twelve schools away from the centers of black population. This, it is argued, served to attract whites to the outlying areas, resulting in a number of schools with over 90% white enrollment. This is a weak foundation for the remedy the court today orders. Adjusting the boundaries of the PCSSD and the LRSD so that the latter are coterminous with Little Rock city limits will not affect the twelve schools in question, which are located far from the city limits. There simply is no indication in the record that the suspect school sitings had any impact on the schools within the Little Rock city limits that, as a result of the court's decision today, will now be turned over to the LRSD.

Judge Arnold's opinion treats in detail what interdistrict effects might result from the history of annexations and

deannexations. The district court's order stressed the freezing of the boundaries. The court today emphasizes testimony that "the boundaries harden[ed]," *ante* at 28, and were "maintained to keep the LRSD predominantly black and the PCSSD predominantly white," and concludes that these manipulations had a substantial interdistrict segregative effect. Admittedly there was expert testimony to support this conclusion. The court relies heavily on Dr. Dentler's testimony that beginning in 1968 the board of PCSSD refused to modify its boundaries. *Ante* at 30. To the contrary, the United States argued that PCSSD has not refused a single deannexation petition since it allegedly froze its boundaries. In its brief, LRSD attempts to refute this argument and support the theory that the PCSSD intentionally froze its boundaries:

> The record reveals, however, on 4/13/65 the PCSSD notified the adjacent Bryant and Cabot school districts that it would not accept any more black students. PX 10. The minutes further reveal the county refused to meet with LRSD officials to discuss consolidation on 5/14/68, and refused NLRSD's attempt to annex the Spring Hill area on 4/8/69. Further, informal efforts of the LRSD to discuss cooperative interdistrict agreements failed.

Brief for Appellee at 56.

After argument, this court specifically inquired as to the record support for these statements. LRSD answered that the first sentence had no record support. As to the second sentence, it answered that the PCSSD board had, on May 14, 1968, voted in favor of consolidation with LRSD.[1] On this critical point, therefore, LRSD simply was forced to admit that its argument had collapsed. This collapse not only removes the factual underpinnings from Dr. Dentler's opinion, but makes it directly contrary to the evidence. Judge

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[1] The informal efforts referred to in the last sentence occurred in a later period, shortly before the filing of this action.

Arnold is correct in his conclusion that "it is true . . . that no deannexations have taken place since 1968, but to blame this on PCSSD's desire not to increase its black student percentage is not plausible." *Ante* at 70. On the record before us, I can only conclude that the district court's finding that the PCSSD intentionally "froze" or "hardened" its boundaries, which the court today accepts, is contrary to the evidence, and thus is clearly erroneous.

The only other support for the court's order today is "the pre- and post-*Brown* interdistrict transfers and the other historical violations with continuing effect." *Ante* at 59 n.20. Absent a more specific demonstration of the continuing effects of historical violations, *see ante* at 73 (Arnold, J., concurring and dissenting), I believe that this evidentiary foundation, as well as the entire stated basis for the court's remedy, fails to meet the standards of *Milliken I* and the clarifying interpretation of those standards in *Lee* and *Goldsboro*.

To Judge Arnold's credit, he squarely faces the weaknesses of the court's opinion. His further observations on the support for making the boundaries of LRSD and the City of Little Rock coterminous deserve further comment.

From the decisions of the PCSSD locating schools in areas of white suburban expansion farthest from black population centers, Judge Arnold argues "I believe these factors are having a substantial current interdistrict effect." *Ante* at 71. He argues that the movement of families from outside the entire Pulaski County area to areas within the City of Little Rock also within the PCSSD has been substantially influenced by the unconstitutional siting decisions, causing a phenomenon labeled "white overflight." It must be observed that Judge Arnold does not point to any "substantial evidence" proving this "significant segregative effect," *Milliken I*, 418 U.S. at 744-45, or as expressed in *Lee*, "clear proof of cause and effect and a careful delineation of the extent of the effect." 639 F.2d at 1256. Rather, he relies upon belief. Such beliefs do not, within the limitations of our judicial

power, serve as an appropriate consideration in reviewing the order before us. Judge Arnold makes no effort to determine whether there are findings of the district court which support these conclusions. There simply are none. The imprecise nature of his conclusions and his departure from the principles of *Milliken*, are best evidenced by his conclusion that the ten percent change in racial makeup which results from realigning the LRSD's boundaries "seems a fair approximation of what the racial percentages would have been absent the influence of PCSSD's violations." *Ante* at 72. Thus, his vigorous effort to support the court's conclusion ultimately rests on speculation, belief, and fair approximation, and not upon the principles of *Milliken I* which must guide us.

Judge Arnold's final observation conclusively demonstrates the tenuous nature of his conclusion. He points to "pro-white emanations" that PCSSD has given off over a period of years as a factor which has attracted white parents into the PCSSD areas within the City of Little Rock. There is no indication as to the record source of these emanations. I have substantial question whether such subjectively perceived emanations are sufficiently palpable to make the showing required by *Milliken I* or to constitute the clear proof of cause and effect which *Lee* and *Goldsboro* correctly hold to be necessary.

Judge Arnold's particular approach to these issues must rely upon his own findings. This is contrary to the Supreme Court's teaching in *Anderson* v. *City of Bessemer City*, 105 S. Ct. 1504, 1510-11 (1985), that the trial judge must play the principal role in the determination of facts.

A final observation is in order. The court stretches mightily to find a basis for making the boundaries of the City of Little Rock and the LRSD coterminous. This result will make the LRSD 60 percent black and 40 percent white. However, one most significant factor has been omitted from this equation. In 1980 there were 3,632 white students enrolled in private schools located in the LRSD, 2,794 white

students enrolled in private schools in PCSSD, and 1,086 white students enrolled in private schools in the NLRSD. In the LRSD alone, if the white students in private schools attended public schools, the district would be approximately 52 percent rather than 69 percent black. Another significant factor which is not taken into account is that the number of white students in private schools in LRSD increased by more than 1,000 between 1970 and 1980 and the number of white students in private schools in PCSSD increased by more than 1,700 during the same time period. It is evident from the sharp increase in enrollment in private schools in these ten years, and the impact of these numbers on the total student population, that private choice is having a far greater segregative effect than those factors the court points to in its opinion today.[2] This is a factor, however, that at present, and in all likelihood in the future, will pose a significant impediment to any effort to achieve desegregation within any of the three school districts.

One of the great failings of the court's opinion, as well as that of the district court order, is the failure to address in other than a most speculative way demographic factors, such

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[2]The private school problem seems to be an untouchable issue that none of the parties has evidenced any interest in addressing. It may well be that a substantial portion of the enrollment is in religious and parochial schools. From figures furnished to the court by the parties based upon publications of the state of Arkansas, however, there are nearly 3,000 students in the Little Rock area who attend private schools seemingly having no religious affiliation. There simply is no record before us to determine whether some of this enrollment is pretext for avoiding the impact of desegregation or springs from other motives. We do observe, however, that racial discrimination in private schools, including those with a religious affiliation, is deeply contrary to public policy, *Bob Jones University* v. *United States*, 461 U.S. 574, 595 & n.32 (1983), and that schools which are shown to employ discriminatory practices will be barred from enjoying the governmental privileges accorded their nondiscriminatory counterparts. *Id.* at 595-96.

as population movement and birth rate, common to major metropolitan centers, that have significant impact on the school problems in this and other communities. *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 436 (1966); *see also Bradley* v. *School Board of City of Richmond*, 462 F. 2d 1058, 1066 (4th Cir. 1972), *aff'd mem. by an equally divided court*, 412 U.S. 92 (1973).

I would remand the case to the district court only for further consideration of appropriate relief for intradistrict constitutional violations and for further consideration of the current segregative effect resulting from the Granite Mountain deannexation and for consideration of an appropriate remedy tailored to correct any such violation.

PASCO M. BOWMAN, Circuit Judge, concurring in part and dissenting in part.

I agree with the views expressed in the separate opinion of Judge John R. Gibson, with two reservations.

First, I do not agree that the Granite Mountain transfer provides a proper basis for an interdistrict remedy. This transfer occurred in 1953, when all public facilities in Arkansas, public schools and public housing alike, still were operating, with the law's blessing, on a segregated basis. The black children living at that time in the Granite Mountain housing project would have gone to all-black schools no matter which district those schools happened to be in. Because it seems clear that the maintenance of segregated education was not the motive for this transfer, I would not treat it as a predicate for interdistrict relief.

Second, I do not agree with the thrust of footnote 2 of Judge Gibson's opinion, *ante* at 84. Specifically, I do not agree that lawfully operated private schools are an "issue" that any of the parties to this lawsuit should have an interest in addressing. Parents choose their children's schools for many different reasons. Sometimes the reasons are admirable, sometimes not. So long as this remains a free

country, however, the motives of individual parents in opting to send their children to private school rather than public school will remain none of the law's concern.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX II

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

LITTLE ROCK SCHOOL DISTRICT *Plaintiff*

V. No. LR-C-82-866

PULASKI COUNTY SPECIAL SCHOOL DISTRICT, ET AL *Defendants*

MRS. LORENE JOSHUA, as Next Friend of Minors LESLIE JOSHUA, ET AL *Intervenors*

KATHERINE KNIGHT, Individually and as President of The Little Rock Classroom Teachers Association (LRCTA), ET AL *Intervenors*

MEMORANDUM OPINION

I. INTRODUCTION

This Court issued its Memorandum Opinion on April 13, 1984, *Little Rock School District* v. *Pulaski County Special School District, et al*, 584 F.Supp. 328 (E.D. Ark. 1984), finding, among other things, that the defendant districts had engaged in unconstitutional and racially discriminatory acts resulting in substantial interdistrict segregation. In its complaint the Little Rock School District (LRSD) prayed that this Court order consolidation of the school districts found in

Pulaski County. Having determined that the substantial interdistrict violations could be rectified only by corresponding substantial interdistrict relief, the Court ordered the requested consolidation. The parties were informed that a hearing would be conducted on April 30, 1984 to consider the precise nature of the consolidation plan to be implemented.

At the April 30, 1984 hearing all parties were afforded an opportunity to present *any* testimony they desired concerning the remedial aspects of this case. The LRSD presented a plan that was authored primarily by Dr. Robert Dentler. Rather than offering alternative plans or constructive criticism of the LRSD plan, the defendant districts chose to attack the consolidation concept at every juncture and destroy the LRSD plan. Much of their effort seemingly was aimed at relitigating the liability portion of this case rather than assisting the Court in the formulation of a workable solution to the interdistrict violations which were found to have occurred. While the Court recognized the need for all parties to fulfill their duties as adversaries in this litigation, it was hoped that, without prejudicing their right to appeal, the defendant districts would take a more constructive approach to the remedial portion of this case. On numerous occasions subsequent to the April 30, 1984 hearing, the defendant districts voiced the opinion that this court foreclosed them from puting forth alternative remedies. Due to the negative approach taken by the defendant districts at the April 30, 1984 hearing (in the face of this court's need for their constructive participation) and the resulting cloud of confusion created by their complaints that they had been prevented from offering alternative remedies, the Court adhered to the suggestion of the Court of Appeals that the remedial hearings be reopened for the purposes of permitting these defendants to advance different remedies. A hearing to afford these defendants that opportunity, as well as to allow the various intervenors to participate in the remedial aspects of the case, was held beginning on July 30, 1984.

Subsequent to the conclusion of this portion of the remedial hearings, Intervenors Knight, et al sought to substitute an exhibit reflecting the current Professional Negotiations Agreement (PNA) between the Little Rock Classroom Teachers Association and the LRSD, and the Pulaski County Special School District (PCSSD) sought permission to supplement the record to reflect offers to engage in some form of voluntary transfers of students among the districts.

PCSSD's motion to supplement the record to include the aforementioned correspondence is granted. The attorneys representing PCSSD are directed to meet with this Court's courtroom deputy clerk to facilitate the marking and listing of these exhibits for the record.

Intervenors Knight, et al's motion to substitute a current PNA is granted, and her attorney should likewise meet with the Court's courtroom deputy so as to ensure that this substitution of exhibits is accomplished.

The parties have submitted post-hearing briefs, and the Court has reviewed its April 13, 1984 Memorandum Opinion and the transcript of the remedial hearings. With this background and a view toward tailoring the remedy to fit the nature and extent of the constitutional violations, *Milliken* v. *Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974), the Court is prepared to render its opinion concerning the remedial aspects of this case.

II. ALTERNATIVE PLANS

A. The Pulaski County Special School District Plan

The PCSSD plan (PCSSD X 83) was generally described as voluntary with mandatory backup. Fritz Friedl, Administrator for Research, Planning and Quality Assurance for Pulaski County Special School District, coordinated efforts within the PCSSD staff and patrons in drafting the plan and presented the plan at the July 30, 1984 hearing. The plan retains the three autonomous school districts and relies on the development of specialty or magnet schools to attract students from one district to another. These magnet

schools would be governed by a tri-district committee that would oversee the location of schools, student assignments, transportation, faculty and financing. The fatal flaw with this plan is its undue reliance on voluntary transfers. This Circuit held that "voluntary interdistrict transfers . . . as a remedy for an *intradistrict* violation . . . comply with constitutional standards," *Liddell* v. *State of Missouri*, 731 F.2d 1294, 1305 (8th Cir. 1984) (emphasis added) and in some cases these "freedom of choice" features may still have some vitality. *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1967). However, in the face of the dejure segregative acts found to have occurred and which are continuing, it would be naive to conclude that such a voluntary plan would succeed in this case. The PCSSD plan fails to adequately address the interdistrict segregative effects found to exist and cannot be approved. *Little Rock School District* v. *Pulaski County Special School District, supra*, findings of fact numbered 103-105.

B. The North Little Rock School District Plan

The North Little Rock School District (NLRSD) had consistently taken the position that they would not offer an alternative plan, notwithstanding their criticism that they had been denied such an opportunity. However, on the eve of the July 30, 1984 hearing, the NLRSD apparently reached the conclusion to support what has been referred to as the "Masem/Western Wedge Plan." One of the proponents of this plan was Dr. Paul Masem, former Superintendent of the LRSD and an expert retained by the Joshua Intervenors. Dr. David Armor, one of the NLRSD's expert witnesses, presented testimony in favor of such a plan.

The "Masem/Western Wedge Plan" calls for the NLRSD to retain its separate autonomous identity. The PCSSD north and west of Interstate 30 and south of the Arkansas River would become part of the LRSD. The LRSD east and south of Interstate 30 would become part of the PCSSD. Desegregation under the NLRSD plan would depend largely upon voluntary "M to M" (majority to minority) transfers.

The NLRSD plan defines a desegregated school as one having between 20-50% black enrollment. The plan would allow a deviation of five percentage points on either side of these parameters. A racially isolated school under this plan is defined as one having 90% or more students of one race. An Interdistrict Policy Board would be established to administer and coordinate the various provisions of the plan. This Board would include representatives from each district, as well as the Joshua Intervenors.

The Court finds that this plan, like the PCSSD plan, places too much reliance upon the voluntary motivations of the county patrons. The magnet school concept and "M to M" transfer theories have a great deal of public appeal. However, the Court agrees with Dr. Charles Willie's opinion that there are insufficient incentives offered by the NLRSD plan to expect the transfers under the "M to M" plan to be successful in desegregating the county schools. Any advances in the effort to desegregate these districts made by the suggested alterations in the various district boundary lines would be temporary. The approach suggested by the NLRSD plan fails to adequately address the interdistrict constitutional violations found by the Court and is the sort of half measure condemned by this Court in its earlier opinion.

C. The Interventors Joshua Plan

The Intervenors Joshua chose not to advance any particular plan, but rather through their experts Masem and Dr. John Finger submitted a Position Statement on Consolidation (IX 2). Masem did offer testimony with regard to three options available to the Court which would not necessitate consolidation of all three districts. These options were primarily concerned with alterations in the boundary lines of the existing districts. Option A basically would establish the boundary lines as set forth in the "Masem/Western Wedge" plan espoused by the NLRSD. Option B would have the LRSD bounded on the south and east by Interstate 30 to the county line and on the north by the Arkansas River and Interstate 40 from the current NLRSD boundary to the county line. The NLRSD would administer the remaining

portion of the county north of the Arkansas River, and the PCSSD would administer the remaining portion of the county south of the Arkansas River. Under Option C, the LRSD would exist as set forth in Option B and the remaining PCSSD would be consolidated with the NLRSD. These options are not supported by sufficient data to convince the Court that any of them would adequately remedy the constitutional violations found by the Court. In fact, Masem opined that consolidation of all the school districts within Pulaski County would be the most effective plan from a desegregation point of view (T. 3651). Some of the concerns expressed by these Intervenors have been taken into consideration by this Court in the drafting of this opinion and will, of course, be kept in mind during the finalization of the attendance zones, transportation routes, etc.

D. The Little Rock School District Plan

The LRSD plan (PX 63), often referred to as the "Dentler Plan," resulted from Dr. Dentler's consideration of various alternatives. His thorough consideration of alternative plans, as well as his extensive background of serving as a retained and court-appointed expert in school desegregation litigation, impressed upon this Court his dedication to an objective approach of tailoring the remedy to fit the violation at issue.

In what is referred to as the "St. Louis Case," Dr. Dentler (serving as a court-appointed expert) assisted in the formulation of a consent decree to assist desegregative efforts in that case. It was highly doubtful at the time the LRSD plan was drafted that any sort of consent resolution was possible in this case. Furthermore, the Court accepts Dr. Dentler's other reasons for rejecting this possibility. First, this case involves three districts whereas the St. Louis case involved twenty-five districts. There are also differences in the relative size of the student populations and differences in the degree of utilization of the magnet school concept in St. Louis vis-a-vis the three districts herein. Evidence that suburban school districts offered superior educational opportunities was not present in this case as it was in the St. Louis case, and there

existed a greater number of surplus seats in the St. Louis case allowing greater planning flexibility. Finally, the St. Louis court did not need to address the specific constitutional violations found by the Court in this case. (T. 1766-70.) The voluntary measures incorporated to a large extent in the St. Louis area cannot be utilized here because of the absence of demographic and educational opportunity factors necessary to make a voluntary plan effective.

Although the magnet school-centered concept has many attractive features, it was rejected by Dr. Dentler. This Court accepts much of the criticism made by Dr. Dentler of this alternative. An interdistrict magnet concept cannot be the basis of any plan adopted by this Court to cure the constitutional violations. These districts are not adequately experienced in the magnet concept, and the Court finds that this approach is not economically feasible at this time. However, partial and increased future utilization of the magnet concept could enhance educational opportunities in this county, as well as assisting in making the court-imposed desegregative efforts more palatable.

The alternative of merely extending LRSD lines to be coterminous with the City of Little Rock boundaries would have at most minimal and temporary results and would not adequately address the constitutional violations found in this Court's prior opinion. Likewise, allowing the NLRSD to remain as an "island" within a PCSSD and LRSD consolidated district ignores the need to address the NLRSD's constitutional violations and would enhance the likelihood of creating further racial imbalances.

The Court also agrees with Dr. Dentler's conclusion that an interdistrict voluntary exchange of students would place a disproportionate busing burden upon black students. Furthermore, as Dr. Charles Willie testified, desegregation plans based upon freedom of choice have proved to be total failures. *Green* v. *County School Board of New Kent County, supra* at 440.

Dr. Dentler also considered a consolidation plan espoused by Dr. Colton in the St. Louis case which allowed for a

mandatory redistribution of resources, teachers, etc. with a voluntary approach to the redistribution of students. This approach does not adequately address the constitutional violations found by this Court, and the voluntary aspect of student transfers would be less than adequate in accomplishing the required desegregation.

Finally, Dr. Dentler concluded that the only legitimate prospect of remedying the unconstitutional interdistrict violations and achieving a unitary status of any or all of the party districts is through consolidation. This Court agrees that a countywide interdistrict remedy must be utilized to correct the countywide interdistrict violation found to exist and that this is the only manner of placing the victims of this discrimination in the position they would have occupied absent the discrimination. Consolidation will eradicate the ill effects of these prior segregative violations, and the Court believes there are a number of reasons to conclude that consolidation can be successful in this case. (*See, e.g., Little Rock School District* v. *Pulaski County Special School District, supra*, findings numbered 2, 7-22.) Failure to utilize a countywide consolidation plan would exacerbate white flight problems in the county's residential growth.

The LRSD consolidation plan utilizes a geocoding process of arriving at student assignment areas and divides Pulaski County into six (6) subdistricts. Rather than calling for a specific racial balance (the constitution mandates no "particular degree of racial balance," *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 24 (1971)), this plan establishes a racial composition standard of (+) or (−) 25% of the racial makeup of the student population. The schools are to be equal in quality and have uniform grade structures (K-6); (7-9); (10-12) so as to enhance the ability of students to move about the district more freely. The parties must immediately begin compiling the data necessary to the development of the geocoded student assignment areas. The specific attendance zones of the various grades cannot be defined until the parties cooperate in the assimilation of this

data. The final attendance zones must be submitted to the Court for its approval.

Transportation within the district, one of the more emotional issues of this consolidation, must be accomplished with a view toward minimizing the number of students that must be bussed. When the Court reviews the final attendance zones, the transporation routes will be strictly scrutinized to ensure that the final plans utilize the shortest possible routes to accompiish consolidation. Financially, the additional transportation burden should not impact too greatly on the overall budget requirements of the consolidated district.

While the magnet school concept is not acceptable to the Court as an overall remedy, Dr. Dentler's incorporation of magnet schools into the LRSD consolidation plan is sound. It encourages voluntary com,plaince with the goals of the consolidation plan in exchange for enhanced educational opportunities. Locating these magnet schools in areas populated primarily by blacks should make the transfer of white students from other parts of the district more attractive. The creation of a technical vocational magnet at Metropolitan High is a logical starting point for the use of magnet schools within the consolidated district (*Little Rock School District* v. *Pulaski County Special School District*, *supra* at 340, finding of fact number 14). The development of additional magnets can occur in the future where they compliment the desegregation efforts of the consolidated district.

For desegregation to be successful under the LRSD consolidation plan, the administration must likewise reflect a desegregated staff at all levels and in all units. This must be one of the initial goals of the superintendent and board of the consolidated district. An interim board of directors will be selected by this Court, and it will be their duty to immediately retain the services of a qualified superintendent. These board members and the superintendent must be dedicated to the effective implementation of the LRSD consolidation plan. The board of directors will be responsible for submitting interim reports to the Court reflecting the efforts to implement the LRSD consolidation plan. The frequency of

these reports will be no less than annual, but will be established in the future subsequent to appointment of an interim board and selection of a superintendent by that board. The Court sees no necessity at this time for a separate monitoring committee as suggested by Dr. Dentler.

The boundary lines within the district for the election of the members of the board of directors were significantly altered at the hearings (PX 74, 74A). Mr. Jim Lynch, Director of the Department of Management and Information Services of the University of Arkansas at Little Rock, compiled much of the data and developed this facet of the consolidation plan with the assistance of Mr. Howard Deimer, elections coordinator for the Pulaski County Election Commission. The altered electoral plan calls for a nine-member school board elected from nine single member districts. This method of selection increases the likelihood of minority representation on the board. The date of an election of persons to replace the interim court-appointed board will be established in the future.

Dr. Dentler's analysis of the federal fiscal aspects involved in implementing the Little Rock School District consolidation plan reflects that implementation can occur without significantly increasing the total budgets of the affected districts. Only with more refined study of the costs associated with implementing the LRSD consolidation plan by the new superintendent and board of the consolidated district can a determination be made as to the millage rate which must be uniformly applied within the consolidated district. *See, e.g., Liddell* v. *State of Missouri, supra* at 1320.

During the course of his testimony, Mr. Gene Reville, Superintendent of the Buffalo, New York School District and the court-appointed expert, stated it was his opinion that the success of any consolidation plan depended primarily upon its acceptance by the parents of the consolidated district's school children. The Court was impressed with his analysis of the Dentler plan. His testimony provided the sort of practical insight that only an experienced, professional school administrator could offer. While he approved

Dr. Dentler's plan as an effective desegregation tool, the concerns he expressed about the refusal of the defendant districts to participate in the formulation of a consolidated plan should not be overlooked. These school districts have a continuing duty to obey and implement the orders of this Court. In the discharge of their court responsibilities, the districts owe their patrons an even higher duty. They must, during the planning and implementation of any consolidated plan, consult with their patrons and seek the adoption or modification by this Court of a plan which remedies the interdistrict violations found by the Court but does not ignore the educational and safety needs of the county children. With this in mind the three districts are directed to hold no less than three public meetings within their district for the purposes of explaining the LRSD consolidation plan to their patrons and allowing constructive criticism. These meetings must not be a forum for the condemnation of the consolidation concept. Rather they must solicit comments which will assist in the finalization of attendance zones and transportation routes. Each district's superintendent must be present and be familiar with the consolidation plan so as to be able to explain the plan to the district patrons. A transcript of these public meetings should be submitted to this Court at the cost of each district, and these meetings must be held no later than March 29, 1985.

E. Input of Knight Intervenors

The primary focus of the post-hearing submission of the Knight Intervenors concerned securing and protecting the contractual rights of the teachers employed by the three districts. Their interests will be protected by the Court. However, it would be premature at this time to impose any particular contract on the consolidated district. The Court will involve itself in this potential contractual dispute only when it becomes apparent that the interim board is unable to come to an agreement with its teachers. The Court realizes the importance of teacher support and participation in the successful implementation of any remedy and will address any financial and assignment disputes between the new

board and the teachers when and if they arise. Of course, the parties should not construe this portion of the opinion as an expression of the Court's intention to become an arbitrator of all disputes arising between the district and its teachers.

III. THE STATE DEFENDANTS

The LRSD requests at this time that the Court enter findings concerning the basis for retaining the state defendants in this case for remedial purposes. In its earlier opinion the Court advised these defendants that they would remain in the case for remedial purposes. *LRSD* v. *Pulaski County Special School District*, *supra* at 353.

The State Board of Education has, by statute, general supervision over all public schools in the State of Arkansas. Ark.Stat.Ann. § 80-113. In addition to that general responsibility, the State Board and the Department of Education have numerous specific duties, including the approval of plans and expenditures of public school funds for new school buildings (Ark.Stat.Ann. §§ 80-113, 80-3506; T. 775); review, approval and disapproval of local school district budgets (Ark.Stat.Ann. §§ 80-113, 80-1305; T. 773); administration of all federal funds for education (Ark.Stat.Ann. §§ 80-123, 80-140); disbursement of State Transportation Aid Funds to local school districts (Ark.Stat.Ann. §§ 80-735, 80-736); assisting school districts in the operation of their transportation system (T. 774); lending funds from the State Revolving Loan Fund to local school districts (Ark.Stat.Ann. § 80-942); approval or disapproval of bonds issued by local school districts (Ark.Stat.Ann. § 80-1105; T. 775); advising school districts regarding the issuance of bonds (T. 777); and regulation of the operation of school buses (Ark.Stat.Ann. §§ 80-1809, 80-1809.2).

The State Board of Education has broad statutory authority to supervise the public schools of the state generally, and to take what action it may deem necessary to "promote the

physical welfare of school children and promote the organization and increase the efficiency of the public schools of the State." Ark.Stat.Ann. § 80-113.

The State Board of Education has the authority to promulgate regulations concerning the earmarking and use of funds used by local school districts (Ark.Stat.Ann. § 80-1305), the use of federal education funds by local school districts (Ark.Stat.Ann. § 80-142) for the administration of State Transportation Aid Funds by local school districts (Ark.Stat.Ann. § 80-735), and for the operation of school buses by local districts (Ark.Stat.Ann. §§ 80-1809, 80-1810).

The State Board of Education may lend funds from the State Revolving Loan Fund for the purchase of school buses and other equipment, for making major repairs and constructing additions to school buildings, for the purchase of sites for new school buildings, for the construction of new school buildings, and for the purchase of surplus buildings. Ark.Stat.Ann. § 80-942.

The State Board of Education has never acknowledged its affirmative duty to assist the local school districts in their desegregation efforts. In the performance of its statutory duties, as set forth above, the State Board has never promulgated any rules or guidelines which would encourage the local districts to eliminate discrimination in their school systems. These omissions have had their greatest impact on the issues of school construction, student transportation, and financial assistance to local districts. Had the State Board taken affirmative steps in providing incentives to local school districts to comply with desegregation requirements, desegregation within the school districts in Pulaski County would have been greatly enhanced. These deficiences in the State Board's discharge of its affirmative duty to encourage desegregation in the local school districts had an interdistrict effect upon the Little Rock, Pulaski County, and North Little Rock school districts. Other branches of the State, as set forth in the court's earlier opinion, *Little Rock School District* v. *Pulaski County Special School District*, *supra* at 328-335, share responsibility with the State Board for these

constitutional violations, but the State Board must be the remedial vehicle for their violations as well. The State Board therefore has remedial responsibilities with respect to this case. *Adams* v. *United States*, 620 F.2d 1277 (8th Cir. 1980 (en banc)), *cert. denied*, 449 U.S. 826; *Liddell* v. *State of Missouri*, 731 F.2d 1294 (8th Cir. 1984), *cert. denied*, — U.S. —. The precise nature of these financial and oversight responsibilites must await further refinement of the consolidation plan and development of a budget for such consolidated district.

IV. SUMMARY

The three districts in this case have an affirmative obligation to eliminate segregation "root and branch." *Swann* v. *Charlotte-Mecklenburg Board of Education, supra.* Having failed in the discharge of this responsibility, it is the duty of this Court to fashion a remedy of a nature and scope sufficient to meet the constitutional violations found to have occurred. *Milliken* v. *Bradley, supra; Hills* v. *Gautreaux*, 425 U.S. 284, 96 S.Ct. 1538, 47 L.Ed.2d 792 (1976). This Court cannot shrink from this duty and in approving a remedy, the Court must restore "the victims of the discrimination as nearly as possible to the position they would have occupied absent that discrimination." *Liddell* v. *State of Missouri, supra* at 1306.

The Court therefore approves the LRSD consolidation plan and directs that the parties undertake the implementation of said plan.

This 19th day of November, 1984.

/s/ Henry Woods
HENRY WOODS, U.S. District Judge

APPENDIX III

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

LITTLE ROCK SCHOOL DISTRICT *Plaintiff*

V. No. LR-C-82-866

PULASKI COUNTY SPECIAL SCHOOL DISTRICT, ET AL *Defendants*

MEMORANDUM OPINION

I. DESEGREGATION LITIGATION IN THE THREE DISTRICTS

A. The Little Rock School District

Nothing better illustrates the failure of the separate but equal doctrine[1] than the school situation in Pulaski County, Arkansas in 1930. There were 2500 black students in the Pulaski County School District, which embraced all of Pulaski County outside Little Rock and North Little Rock. Twelve of these students were attending senior high school. Eight were in the tenth grade, four in the eleventh and none in the twelfth. There was one black high school (if such it could be called)—the Pulaski County Training School. (PX 52) One of the justifications for this shocking fact was "any residents of the County who might want a 'city school education' would find the school systems of Little Rock and North Little Rock in easy

[1] *Plessy* v. *Ferguson*, 163 U.S. 537 (1896).

reach." (PX 52) This statement was partially true, since Little Rock's Dunbar High School, which opened in 1930 with a 1600 student capacity, was "considered at that time the most modern and complete public high school building in the United States created specifically for negroes." (PX 52) Dunbar contained "thirty-four classrooms, physics, chemistry and biology laboratories, a library with 8,000 volumes, a commercial department, a foods laboratory, an auditorium and stage with modern lighting equipment, three clothing laboratories, a cafeteria, a laundry, and shops for carpentry, woodwork, plumbing, electricity, automobile mechanics, brick laying, and printing." (PX 52)

It is quite understandable that ambitious black students from Pulaski County and North Little Rock and indeed from the far corners of Arkansas would make a pilgrimage to Dunbar. The sad fact is that in few localities in Arkansas were blacks furnished a decent and acceptable high school education. Dr. Leroy M. Christophe, former principal of Dunbar and retired principal of Howard High School in Wilmington, Delaware, testified how he came to Little Rock from his family home at Forrest City, one hundred miles distant, to get a high school education in the Little Rock School District since none was available in his home community. (T. 17-19) Going to Gibbs High School, the predecessor to Dunbar and located on the same site, was described by Dr. Christophe in these terms: "Well, in those days everybody knew that—well, we used to call the schools in Little Rock 'Heavenly Schools' because everybody wanted to go—it's kind of like going to heaven, you know. I mean, when you're a child, when we were children everybody looked forward to something good, and so we all looked forward to what we called 'Heavenly Schools' over here in Little Rock, Arkansas."

A study published in 1941 referred to the "influx of students to Dunbar from neighboring sections . . . drawn to Little Rock because of inferior educational facilities in their own towns." (PX 52) In 1938-39 Little Rock was spending

$39.54 for each black pupil, North Little Rock, $16.33, and Pulaski County, $13.74. (PX 52) From the 1938-39 school year until the 1946-47 school year, no more than three percent of all black students in the Pulaski County School District were enrolled in high school as compared to 9-12 percent in North Little Rock and 12-16 percent in Little Rock. (PX 52)

During this period schools in Arkansas were evaluated in descending order as follows. The highest rating was an accreditation by the North Central Association followed by an (A), (B) and (C) rating by the State Department of Education. An unaccredited school was given an (X) (T. 160; PX 52). As late as 1950 Dunbar High School in the Little Rock School District was the only black high school in Pulaski County with a North Central accreditation. Jones High School in North Little Rock had a (B) rating in 1940 and an (A) rating in 1950. The Pulaski County District in 1950 had two black high schools—Pulaski County Training School at McAlmont and J. C. Cook at Wrightsville. The former had a (C) rating and the latter an (X) or unaccredited rating. (PX 52)

Before *Brown* v. *Board of Education*, 347 U.S. 483 (1954), the only way a black student living outside the Little Rock School District could get a high school education from a North Central accredited school was to find some way to gain access to Dunbar High School or its predecessor, Gibbs High School. Fortunately, these schools did not look askance at the residence of those who appeared at their doors. Some like Dr. Christophe came from Forrest City (T. 17). Some like Mrs. Annie Abrams came from Arkadelphia (PX 52). Some came from North Little Rock and many came from the Pulaski County School District, which had not even the semblance of an accredited black high school.

As far as the education of blacks was concerned, school district boundaries in Pulaski County were ignored. There was interdistrict cooperation in the time period between the two World Wars as to busing and student transfers. The

latter were freely made, both formally and informally, the largest volume being from the Pulaski County Special School District to the Little Rock and North Little Rock School Districts.

It cannot be seriously denied that the Little Rock School District's maintenance of the only North Central accredited black high school in the County and indeed in the entire area led to a concentration of blacks in this district. For almost half a century it has not only assumed the burden of giving a quality education to blacks in the County and from far corners of the State but has also been the object of racially motivated attacks by certain political and cultural groups.

Two years after the *Brown* decision, an amendment to the Arkansas Constitution was adopted which disinterred the discredited doctrine of nullification (and which still remains as Amendment 44). Section 1 of this amendment, sponsored by the political leadership of this state, reads as follows:

> From and after the Adoption of this Amendment, the General Assembly of the State of Arkansas shall take appropriate action and pass laws opposing in every Constitutional manner the Un-Constitutional [sic] desegregation decisions of May 17, 1954 and May 31, 1955 of the United States Supreme Court, including interposing the sovereignty of the State of Arkansas to the end of nullification of these and all deliberate, palpable and dangerous invasions of or encroachments upon rights and powers not delegated to the United States nor prohibited to the States by the Constitution of the United States and Amendments thereto, and those rights and powers reserved to the States and to the People thereof by any department, commission, officer, or employee of such department or commission of the Government of the United States, or of any government of any Nation or Federation of Nations acting upon the apparent authority granted them by or assumed by them

> from the Government of the United States. Said opposition shall continue steadfast until such time as such Un-Constitutional [sic] invasions or encroachments shall have abated or shall have rectified, or the same shall be transformed into an Amendment to the Constitution of the United States and adopted by action of three-fourths of the States as provided therein.

The spirit and letter of this amendment was invoked against the Little Rock School District when in September, 1957 it sought to admit nine black students to Central High School in conformity with an order of this court based upon *Brown* v. *Board of Education, supra.* Their entrance was barred by National Guardsmen on order of Governor Orval Faubus. The Little Rock School Board had formally stated its intention to comply with *Brown* three days after that decision was rendered: "It is our responsibility to comply with Federal Constitutional Requirements and we intend to do so when the Supreme Court of the United States outlines the method to be followed." *Cooper* v. *Aaron*, 358 U.S. 1, 7 (1958).

The tragic history of the Central High case is recited by the Supreme Court in *Cooper* v. *Aaron, supra*, pp. 8-12. After adopting the above statement of policy, the Board instructed the Superintendent of Schools, Virgil Blossom, to prepare a plan for desegregation, which was approved on May 24, 1955, seven days before the Supreme Court's second opinion in *Brown* v. *Board of Education*, 349 U.S. 294 (1955). Desegregation of the Little Rock schools would begin at senior high level and would be progressively extended downward. "Following the adoption of this plan, the Superintendent of Schools discussed it with a large number of citizen groups in the City. As a result of these discussions, the Board reached the conclusion that 'a large majority of residents' of Little Rock were of 'the belief . . . that the Plan, although objectionable in principle,' from the point of view of those supporting segregated schools 'was still the best for the interests of all pupils in the District.'" *Id.* at 8. The plan was upheld in the

District Court[2] and the Court of Appeals.[3] There was no appeal from these judgments to the Supreme Court. "While the School Board was thus going forward with its preparation for desegregating the Little Rock school system, other state authorities, in contrast, were actively pursuing a program designed to perpetuate in Arkansas the system of racial segregation which this court had held violated the Fourteenth Amendment." *Id.* at 8. The Legislature in 1957 enacted and Governor Faubus signed a pupil assignment law, a statute relieving school children from compulsory attendance at racially mixed schools, and a statute establishing a state sovereignty Commission, which was given the broadest possible powers to:

> (a) Perform any and all acts and things deemed necessary and proper to protect the sovereignty of the State of Arkansas, and her sister states from encroachment thereon by the Federal Government or any branch, department or agency thereof, and to resist the usurpation of the rights and powers reserved to this State or our sister states by the Federal Government or any branch, department or agency thereof.
>
> . . . . .
>
> (d) Give such advice and provide such legal assistance as the Commission considers necessary or expedient, when requested in writing to do so by resolution adopted by the governing authority of any school district, upon matters, whether involving civil or criminal litigation or otherwise, relating to the commingling [sic] of races in the public schools of the State; such advice and legal assistance to be rendered under such rules and regulations as the Commission may adopt.

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[2] *Aaron* v. *Cooper*, 143 F.Supp. 855.

[3] *Aaron* v. *Cooper*, 243 F.2d 361 (1957).

> (e) Study and collect information concerning economic, social and legal development constituting deliberate, palpable and dangerous invasions of or encroachments upon the rights and powers of the State reserved to the State under Amendment Number Ten to the Constitution of the United States.

The Little Rock School District nevertheless continued with preparations to carry out its desegregation program. Nine black children out of two thousand students were scheduled for admission upon the opening of school in September, 1957. However, these plans met "with drastic opposing action on the part of the Governor of Arkansas who dispatched units of the Arkansas National Guard to the Central High School grounds and placed the school 'off limits' to colored students. As found by the District Court in subsequent proceedings, the Governor's participation had not been requested by the school authorities and was entirely unheralded." 358 U.S. at 9.

When the children attempted to enter Central High School on September 4, 1957, units of the Arkansas National Guard "acting pursuant to the Governor's order stood shoulder to shoulder . . . and thereby forcibly prevented the nine . . . from entering. . . . They did not prevent any white students from entering the school." *Aaron* v. *Cooper*, 156 F.Supp. 220, 225 (E.D. Ark. 1957). This outrageous conduct in direct violation of a lawful order of this court, never reversed or modified on appeal, was continued for three weeks. 156 F.Supp. at 225. On September 2, 1957 U.S. District Judge Ronald Davies, sitting by assignment, enjoined the actions of Faubus and his military subordinates "to protect and preserve the judicial proceedings of this Court, to maintain the due and proper administration of justice, and to protect the constitutional rights of the minor plaintiffs." *Id.* at 226. Judge Davies was unanimously affirmed by the Court of Appeals. *Faubus* v. *United States*, 254 F.2d at 797 (1958). After the issuance of the injunction, the National Guard was withdrawn and on Monday, September

23, 1957 the nine black students entered Central High School in the face of a large and unruly crowd, led and encouraged by violent extremists many of whom were imported from outside the City of Little Rock. The officers on duty had difficulty controlling the hostile mob. They advised the Superintendent to remove the children from the school, which was done.[4] To insure the safety of the children and the enforcement of the order of the court, President Eisenhower then dispatched federal troops to Central High School. They were later replaced by federalized National Guardsmen who remained throughout the year. Eight of the students remained in attendance through the school year, 1957-58.

On June 20, 1958 Judge Harry Lemley granted a two-year postponement of the integration plan. *Aaron* v. *Cooper*, 163 F.Supp. 13 (E.D. Ark. 1958). His order was promptly reversed by the Court of Appeals on August 18, 1958. The opinion by Judge Matthes bespoke the difficulties of the Little Rock School District and its Board. "As we have seen, they have been constantly harassed; they have met with overt opposition from the public, and the legislature through passage of the 1957 enactments. The executive department of the State of Arkansas has openly opposed their efforts, as demonstrated by the Governor's statement of the official policy of the State of Arkansas against integration, followed by the use of National Guardsmen to prevent entry of Negro students." *Aaron* v. *Cooper*, 257 F.2d 33, 39 (8th Cir. 1958). Judge Matthes closed his opinion with a ringing affirmation of the rule of law and the absolute necessity for obedience to the lawful orders of a court of law by all within its jurisdiction—whether he be a governor, an ordinary citizen, or even the President of the United States. "The issue plainly comes down to the question of whether overt public resistance, including mob protest, constitutes sufficient cause to nullify an order of the federal courts directing the Board to proceed with its integration plan. *We say the time has not yet come in these United States when an order of a Federal Court must be*

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[4] *Aaron* v. *Cooper*, 163 F.Supp. 13, 16 (E.D. Ark. 1958).

whittled away, watered down or shamefully withdrawn in the face of violent and unlawful acts of individual citizens in opposition thereto. (Emphasis by the Court.) *Aaron* v. *Cooper*, 257 F.2d 33, 40 (8th Cir. 1958).

In its opinion rendered September 12, 1958 affirming the Court of Appeals, the Supreme Court quoted with approval a pleading filed by the School Board. "The legislative, executive, and judicial departments of the state government opposed the desegregation of Little Rock schools by enacting laws, calling out troops, making statements villifying federal law and federal courts, and failing to utilize state law enforcement agencies and judicial processes to maintain public peace." *Aaron* v. *Cooper*, 358 U.S. 1, 15 (1958). After fully reviewing the events at Central High School, the Supreme Court reaffirmed several basic principles which must never be disregarded if this nation is to remain a constitutional democracy dedicated to a rule of law:

> The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. . . . In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'
>
> Article VI of the Constitution makes the Constitution the 'supreme Law of the Land.' In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as the 'the fundamental and paramount law of the nation,' declared in the notable case of *Marbury* v. *Madison*, 1 Cranch 137, 177, that 'It is emphatically the province and duty of the judicial department to say what the law

> is.' This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3, 'to support this Constitution.'
>
> No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it.

358 U.S. 1, 16-18.

While the appeal in the above case was pending and after his nomination in the summer primaries of 1958, Governor Faubus called a special session of the Legislature to meet in August of 1958. At his behest the Legislature passed Act 4 which authorized him, by proclamation, to close any or all public schools within any school district pending a referendum "for" or "against" the "racial integration of all schools within the school district." Act 9 authorized the removal by recall of any or all members of local school district boards. Act 6 permitted students to transfer to segregated schools across district lines if the schools they ordinarily attended were to be desegregated, and by a later 1959 statute the State of Arkansas picked up the bill for these transfers even if they were to private schools. Ark. Acts 1959 No. 236.

On September 13, 1958, the day after the Supreme Court rendered its decision in *Aaron* v. *Cooper, supra*, Faubus issued

a proclamation closing the four Little Rock High Schools, white and black. They remained closed throughout the 1958-59 school year. Thus, the education of 3,400 high school students in the Little Rock School District was interrupted. (PX 65) For many students it was never resumed.

On November 15, 1958 the five moderate members of the School Board resigned in frustration, leaving one avowed segregationist on the Board, who was elected to Congress in a write-in campaign against a popular eight-term Congressman. Moderates in Little Rock nominated five candidates for election to the School Board at the regular school election on December 6, 1958. Three of these were elected, leaving the Board equally divided between segregationists and the moderates, whom the Governor branded publicly as "integrationists." (PX 65) All three of the latter were prominent, conservative businessmen. The three segregationists on the Board voted not to renew the contracts of 44 teachers in the Little Rock School District whom they described as "integrationists or individuals who collaborated with integrationists." (PX 65) Renewal of the contracts required a majority of the School Board. Dismissal of these teachers, many of whom were the best and most experienced teachers in the district, galvanized a few leading citizens into activity and brought into being an organization, the Women's Emergency Committee, which would spearhead the movement to retain the dismissed teachers and to reopen the schools. The leadership and commitment of this group of dedicated women made possible the first victory for the moderate forces since the controversy had begun over integration of the Little Rock School District. The Women's Emergency Committee became the active and front-line component of a broader movement called STOP (Stop This Outrageous Purge) which determined to force the teacher dismissal issue by recalling the segregationist members of the School Board. Thus, a part of the Faubus 1957 legislative package would be used to thwart the teacher firing. The Governor's supporters retaliated with petitions to recall those on the Board opposed to the teacher dismissals. A coalition composed of representatives from the Chamber of Commerce,

labor, parent-teacher associations and black groups, organized and spearheaded by the Women's Emergency Committee, was victorious in the recall election. The segregationists were recalled; the moderates were retained. (PX 65) Act 4, the school closing legislation, was declared unconstitutional by a three-judge federal court on June 18, 1959 and the way was thus cleared to reopen the closed schools for the 1959-60 school term. *Aaron* v. *McKinley*, 173 F.Supp. 944 (E.D. Ark. 1959).

The election of a School Board committed to a rule of law did not by any means solve the problems of the Little Rock School District. Until January, 1967 it was faced with a hostile governor and state administration and an unfriendly legislature. As detailed by Judge Matthes in *Clark* v. *Board of Education of Little Rock School Dist.*, 426 F.2d 1035 (8th Cir. 1970), *cert. denied* 402 U.S. 952 (1971), a number of desegregation plans were advanced by the School Board in the decade of 1960 in a good faith effort to provide a solution to continuous litigation. Two of the best known plans, one advanced by a team of experts from the University of Oregon and the other by School Superintendent Floyd Parsons, failed in the hysterical political atmosphere of that period. There was, however, significant progress in desegregating the Little Rock Schools. In the 1969-70 school year Central High School, the scene of so much turmoil ten years earlier, had 1,542 white students and 512 blacks. "Where before Negro teachers were heavily concentrated in those schools long identified as Negro, they are now distributed throughout the District so that no school has more than 50% Negro teachers." 426 F.2d at 1041. In 1971 the Court of Appeals approved a plan for the desegregation of grades 6 through 12 in the Little Rock School District. *Clark* v. *Board of Education and the Little Rock School District*, 449 F.2d 493 (8th Cir. 1971), *cert. denied* 405 U.S. 936 (1971). The School Board plan for integration of the elementary grades in the Little Rock District was approved with some modification in *Clark* v. *Board of Education of Little Rock School District*, 465 F.2d 1044 (8th Cir. 1972), *cert. denied* 413 U.S. 923 (1973).

In the most recent decision involving the Little Rock School District, the Court of Appeals affirmed Judge Overton's approval of what is known as the "Partial K-6" plan for the elementary grades. *Clark* v. *Board of Education of the Little Rock School District*, 705 F.2d 265 (8th Cir. 1983). This decision has important implications for the case at bar and contains significant statistical history with regard to the changing racial makeup of the Little Rock School District. In the 1973-74 school year 48% of the 21,095 students in the Little Rock District were black. By the 1976-77 year the percentage had increased to 54%. During the same period the range of blacks in the elementary grades had increased from 41-77% to 31-90%; in the middle school from 44-58% to 44-60%; in junior and senior high schools the percentages remained fairly constant.

By the fall of 1981, three thousand less students were enrolled in the Little Rock School District than in the fall of 1973. The percentage of black students had increased from 48% to 65%. Seventy-six percent of the elementary students were black, compared to 69% of the intermediate students, 62% of the junior high students and 55% of the high school students. "The district court found that the decline in the percentage of white students enrolled in the Little Rock public schools could generally be explained by the movement of white families from the district to the suburbs, some of them to avoid sending their children to integrated schools, and by an increase in the black population in the school district, caused in part by a higher birth rate in the black population." 705 F.2d at 267. The Court of Appeals noted and emphasized the 1980 remark of the school's Superintendent that "Little Rock is fast becoming a black school district." A team from Stephen F. Austin State University was retained to survey the problem. Its December, 1981 report confirmed the superintendent's assessment "that if the demographic shifts and white flight continued, the school district would have an all-black enrollment within the next few years. . . . Black students were being bused to schools in which they attended virtually all-black classes. Financial

support of the schools was eroding, and the public's confidence in the ability of the public school system to provide quality education was decreasing." 705 F.2d at 271.

The "Partial K-6" plan was a response to these critical problems. It increased black enrollment of four elementary schools in black neighborhoods—Carver, Ish, Mitchell and Rightsell—to the point where they were virtually all black. It reduced blacks in five white or integrated neighborhoods and in one school located in a black neighborhood. "The theory behind the adopted plan was that by making these changes in enrollment patterns, integrated schools could be preserved at least for a time in the six schools listed and in a number of other schools in which smaller adjustments were made." 705 F.2d at 270.

The School Board and the Court of Appeals both noted that the above steps were only stopgap measures. "The plan as adopted represented the Board's attempt to temporarily reorganize attendance patterns while the School Board pursued longer range plans to ensure an integrated school system." 705 F.2d 265. Significantly the Court alluded to the case at bar as such a possible solution, quoting in some detail from the relief sought in the complaint.

The Superintendent's prophecy concerning the racial makeup of the Little Rock School District is being rapidly realized. Enrollment by race in the District schools for the year 1983-84 is shown in Exhibits 1, 2 and 3 to this opinion. Exhibit 1 shows the elementary school breakdown of enrollment; Exhibit 2 shows the junior high school enrollment breakdown; and Exhibit 3 shows the senior high school enrollment breakdown.

As will be later estabiished, there is considerable difference in the attitude of the Board and staff of the Little Rock School District vis-a-vis integration and the attitude of defendants. It can be safely said that the former is striving mightily to eliminate segregation "root and branch" from the Little Rock schools: efforts of the latter leave much to be

desired. The Little Rock effort is reflected by its programs, policies, resource commitment, and the high percentage of black teachers and staff members. Educational opportunities for black students are thus provided in many ways that are absent in the other systems.

B. The Pulaski County Special School District

There was little or no integration in the Pulaski County Special School District until a private desegregation suit was filed in 1968. *Zinnamon* v. *Board of Education of the Pulaski County Arkansas Special School District*, No. LR-68-C-154. As a result of this litigation, the District filed a plan for the 1971-72 school year which was approved with some modification by then District Judge J. Smith Henley. Their plan called for integration of staff and faculty and a limited integration of four elementary schools, whose enrollment was 12,453 whites and 2,901 blacks (19%). Under the plan six of the twenty-seven schools would be all white. Almost half the blacks were concentrated in three schools: College Station with 510 blacks and 11 whites; Cook with 463 blacks and 76 whites; and Scott with 253 blacks and 141 whites. In a number of other schools the black minority was far below 19%. Only one black was projected for Lawson School; 10 at Bayou Meto (out of 919); 28 at Landmark (out of 388); 38 at Mabelvale (out of 642); 68 at Sylvan Hills (out of 710). With reference to the situation in the elementary schools, Judge Henley stated "that more is going to have to be done about the elementary schools in the future." (Mem. Op. p. 5)

The district then operated four senior high schools, two junior-senior high schools and seven junior high schools. The total projected enrollment for the 1971 school year was 11,000 with about 9% being black. Under its plan students would be assigned to these schools on the basis of geographical attendance zones. (PCSSD X 53) Judge Henley found that racial balance could not be achieved without a radical redistricting of the secondary school system because "there are simply not enough black secondary students in the district." (Mem. Op. p. 7) An appeal was taken from Judge Henley's decision, which was subsequently dismissed.

In June, 1973 the parties to this litigation entered into a consent decree which, among other things, required:

A. At least six black elementary school principals and two black secondary principals.

B. School construction plans which are not racially discriminatory.

C. Bi-Racial Committees and the appointment of two blacks as ex-officio members of the School Board.

D. Use of the criteria found in *Swann* in the construction of new schools.

E. Black teachers to be employed in proportion to the ratio of black pupils in the district.

F. The assignment of pupils to various schools so that there would be no racially identifible schools. (T. 202)

In a number of respects there has not even been minimal compliance with the mandates of this decree. The selection of sites for new schools built after the entry of the *Zinnamon* decree has been made without any consideration for the impact such selection would have on desegregation. The Pulaski County Special School District has never made an attempt to establish a bi-racial committee as required by the *Zinnamon* decree nor has it complied with the mandate requiring that two black citizens elected and selected by the black community serve in an ex-officio capacity on its Board of Education. The District has never instituted any procedure as required by *Zinnamon* to encourage administrators to structure curricular and extracurricular activities to insure the participation of a proportionate number of blacks.

Blacks are underrepresented in the central administration and in teaching positions in the district. Paragraph 4(e) of the *Zinnamon* decree required that the district operate a unified school system so that "each school would (except one or two schools distant from the black community) have a black enrollment of not less than ten nor more than twenty-

five percent." Ten years after this direct mandate of Judge Henley, fifty percent of the schools are not in compliance therewith, as admitted by the Superintendent.

In summary, the Pulaski County Special School District Board has failed to demonstrate any efforts or intentions to comply with the directives of the *Zinnamon* decree or to eliminate the last vestiges of segregation as required by Judge Henley's order.

C. The North Little Rock School District

While desegregation of the Little Rock schools began in 1957, no effort was made to desegregate the North Little Rock schools until the opening of the 1964 term some ten years after *Brown* v. *Board of Education, supra* was decided. A freedom of choice plan adopted in 1965 brought 117 blacks into white schools in 1965-66; 468 in 1966-67; 625 in 1967-68; and 712 in 1968-69. In 1968-69 the total enrollment in the North Little Rock School District was 12,879, of which 2,887 were blacks. No white student ever expressed a desire to attend a black school and none was ever assigned to such a school. *Graves* v. *Board of Education of North Little Rock School District*, 299 F.Supp. 843, 846 (E.D. Ark. 1969). In response to litigation by blacks, the District came forward with a desegregation plan for the 1969-70 school year which Judge Henley declined to approve since the plan would maintain "an essentially segregated faculty" and a freedom of choice plan which had not "served to disestablish the existing dual elementary school system." Judge Henley noted that there was no reason "to believe that any white 10th or 11th grader will choose to go to Jones High School [black]." *Id.* at 848. The District was directed to file an amended plan, which it submitted on May 14, 1969. The amended plan for the 20 elementary schools proposed attendance zones under which ten of the twenty elementary schools would be all white and one all black; of the remaining nine schools, six had minorities of four percent or less. *Graves* v. *Board of Education of No. Little Rock, Ark. Sch. Dist.*, 302 F.Supp. 136, 139-140 (E.D. Ark. 1969). Minorities in the other three ranged from 11% to 31%. *Id.* at 140. Judge Henley approved the attendance zone plan for one year only and

warned that "the Board is ultimately going to have to devise another method for assigning elementary students to particular schools." *Id.* at 141. The Board was ordered to completely desegregate staff and faculty in the 1970-71 school year. This position was substantially maintained by Judge Henley in an unpublished opinion rendered in August, 1970. There was an appeal to the Court of Appeals which remanded the case to the District Court for further consideration in view of a series of recent Supreme Court cases.[5] The Court was directed to call for a new plan no later than August 1, 1971. North Little Rock filed a new plan on June 8, 1971. Judge Henley questioned the sufficiency of this plan and an alternative plan was submitted known as the "Storm" plan, named for a member of the Board who was its principal author. "Under it the twenty elementary schools of the District are divided into four groups with each group containing one of the traditional black schools. The heart of the plan is the transfer of large numbers of black students from the black schools in the respective groups to the white schools in these groups and replacing them with white students." *Davis* v. *Board of Education of North Little Rock, Ark.*, 328 F.Supp. 1197, 1202 (E.D. Ark. 1971). Judge Henley approved this plan but because it required busing and the North Little Rock School District had no such provision, implementation of the "Storm" plan was deferred until the 1972-73 school year, twenty years after *Brown* v. *Board of Education, supra.*

With respect to the operation of the Storm plan at the secondary level, a short explanation is in order. The geographical attendance zones for the two high schools are defined by a north-south line bisecting the city into eastern and western divisions. Interstate 30 serves as the divider between these two zones in the southern half of the city. Ole Main High School is centrally located south of I-40 and west of I-30, a short distance from their intersection. Northeast

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[5] *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1 (1971); *Davis* v. *Board of Commissioners of Mobile County*, 402 U.S. 33 (1971); *North Carolina State Bd. of Education* v. *Swann*, 402 U.S. 43 (1971); *McDaniel* v. *Barresi*, 402 U.S. 39 (1971).

High School, located north of I-40 and east of I-30, is not centrally located. Lakewood Junior High shares a campus with Northeast High School. Prior to 1969 Jones High School was maintained as an all-black facility in the Pine Addition, an almost totally black area. Under the Storm plan it was converted to a school for all seventh grade students and renamed Central Junior High School. Because of deterioration of this facility from a physical standpoint, the Board petitioned to close it and transfer all the seventh graders to the Poplar Street School. This court approved the Board's petition and was affirmed by the Court of Appeals. *Davis* v. *Board of Education of North Little Rock, Ark. Sch. Dist.*, 520 F.Supp. 108 (E.D. Ark. 1981), *affirmed* 674 F.2d 684 (8th Cir. 1982). Eighth and ninth grade students attend Ridge Road, Lakewood and Rose City schools. The black percentage of students at these schools in the 1981-82 school year ranged from 28% to 35%. 674 F.2d 684, 688 n.6.

The "Storm" plan was approved by the Court of Appeals. *Davis* v. *Board of Education of North Little Rock, Ark. Sch. Dist.*, 449 F.2d 500 (8th Cir. 1971). At the same time the District Court was directed "to modify its decree to require the board to establish and implement standards with respect to the reassignment of faculty and staff. . . ." *Id.* at 502. On August 10, 1973 Judge Henley reluctantly approved the District's plan for segregated kindergartens. *Davis* v. *Board of Education of North Little Rock, Ark. Sch. Dist.*, 362 F.Supp. 730 (E.D. Ark. 1973).

After an unreported hearing before Judge Terry Shell, the District was ordered to provide additional transportation to black students residing in the Dixie addition who were required to attend Northeast High School. Judge Shell was affirmed by the Court of Appeals. *Davis* v. *Board of Education of North Little Rock, Ark.*, 635 F.2d 730 (8th Cir. 1980), *cert. denied*, 454 U.S. 904 (1981). "Judge Shell noted that although twenty-six percent of the students and twenty percent of the faculty were black, only one of the twenty-three administrators and supervisors in the central office was black; that only five of the twenty-six principals were black (four of the

five being assigned to elementary schools); that only two of the fourteen guidance counselors were black; and that only two of the librarians or audiovisual staff assistants were black." *Id.* at 732. To ameliorate this situation Judge Shell mandated specific recruitment policies, notices of vacancies, and employment criteria, all of which were affirmed by the Court of Appeals. *Id.* at 733. The Court of Appeals made the following significant comments:

> We also note that the record is replete with evidence that black students do not participate in proportion to their numbers in certain extracurricular activities . . . . The record also shows that black students are suspended more frequently than white students and that they tend to be numerically overrepresented in the special education classes for slow learners.

Id. at 733.

At the present time the North Little Rock School District has only one black on its administrative staff and one black high school coach. Black teachers are also underrepresented. An even more disturbing fact, as recently noted by the Court of Appeals, is that twenty percent of the blacks in the North Little Rock District are classified as being mentally retarded or as having learning disabilities.

II. FINDINGS OF FACT

In addition to the findings contained in the Court's discussion of the desegregation litigation in the three districts, the Court makes the following findings:

Background

1. Three school districts serve public school students in Pulaski County, Arkansas: the Little Rock School District, the North Little Rock School District, and Pulaski County Special School District No. 1.

2. Pulaski County can best be described as one large metropolitan area. Although the Arkansas River dissects the cities of Little Rock and North Little Rock, the presence of five major transportation bridges renders any transportation barriers meaningless. (PX 35)

3. The boundaries of the Little Rock School District and the City of Little Rock are not coterminous. While the City of Little Rock encompasses approximately 91 square miles, the Little Rock School District covers 53 square miles. (PX 63 at 9-10) Approximately 40 percent of the City of Little Rock falls outside of the Little Rock School District.

The student population of the Little Rock School District for 1983-84 is 19,052 (70% black—30% white). (T. 1448) There are 27 elementary schools and 9 secondary schools. (PX 63 at 228-229, 233 and 235)

4. The North Little Rock School District boundaries cover an area of approximately 26 square miles and for the most part encompass all of the City of North Little Rock. (PX 35 and PX 63 at 9-10)

The student population (excluding kindergarten) of the North Little Rock School District for 1983-84 is 9,051 (36% black—64% white). (D NLR X 3) There are 18 elementary schools and 6 secondary schools. (PX 63 at 230, 233 and 235)

5. The Pulaski County Special School District serves an area of approximately 755 square miles and includes the remaining parts of Pulaski County not included in the Little Rock School District or the North Little Rock School District. (PX 35)

The student population of the Pulaski County Special School District for 1983-84 is 27,839 (22% black—78% white). (D PCSSD X 64, Table 1) There are 31 elementary schools, 16 secondary schools and 2 kindergarten centers. (PX 63 at 231-32, 233-34, 235)

6. The three school districts are and for many years have been subject to judicial decrees requiring them to disestablish

their previously existing dual school systems. None of the districts have been declared unitary. The history of the litigation involving these districts has been set forth, *supra.*

Interdistrict Cooperation

7. Until approximately 1968, a historical pattern of interdistrict cooperation (e.g. student transfers and deannexation of territory by the Pulaski County Special School District) existed among the three districts. (PX 36, T. 91-95, T. 124-28) An independent study of the status of education in Pulaski County done in 1960 referred to the "excessively high amount of transference of pupils among schools across district lines." (Jt.X 5, p. 3)

8. Transportation across district lines was often relied upon to accomplish these voluntary interdistrict transfers. (T. 115, 118, 129-32)

9. Both the North Little Rock School District and the Pulaski County Special School District accepted white children from the Little Rock School District when the Little Rock schools were closed in 1958. (T. 130, PX 36, PX 12, 10-30-58, 8-13-59)

10. Participation by the North Little Rock School District in interdistrict transfers declined substantially when it became embroiled in the litigation challenging its dual school system. (T. 1163)

11. In addition to formal transfers, it was a common practice for black students to "move" to the Little Rock School District from the defendant districts by simply coming to Little Rock to live with a relative. (T. 84-85, 91-92) Since the students reported a Little Rock address, they did not appear on the official transfer report form. The number of black transfers to the Little Rock School District from these two defendant districts has therefore been consistently understated.

12. Informal, but frequent, "breakfast meetings" between the three school superintendents took place during the 1960's

to discuss school operations and consolidation was often discussed (T. 1124-1125, 1129)

These "breakfast meetings" were also attended by city officials of Little Rock and North Little Rock as well as representatives from the two city housing authorities. (T. 1125)

13. Historically, as the boundaries of the City of Little Rock expanded, the Pulaski County Special District willingly permitted the Little Rock School District to annex portions of the Pulaski County Special School District. (T. 69)

14. An annexation in 1964 was accomplished for the purposes of building a new vocational high school (Metropolitan High) to be operated by the Little Rock School District, but to serve all three districts. A narrow strip of land extending approximately three miles into the Pulaski County Special School District was the subject of the annexation, and Metropolitan High continues to educate students from all three districts. (PX 1)

15. The practice of expanding school district boundaries as city boundaries expanded continued until the last two annexations of residential territory to the Little Rock School District which occurred in 1967 and 1968.

16. The historic intention that the boundaries of the Cities of Little Rock and North Little Rock remain coterminous with the respective school districts is found in a September 19, 1944 resolution of the Pulaski County Board of Education:

> "[I]t is therefore by the Board ordered that all of Pulaski County outside the territory embraced in the cities of Little Rock and North Little Rock be created and organized into a special school district to be named and known as the Pulaski County Special School District." (PCSSD X 41)

Voluntary Consolidation Efforts

17. Two major efforts to consolidate the districts took place in 1960 and 1967. (PX 20-23, 25, 35 and T. 1146-1147)

18. It is clear from reading the minutes of the Pulaski County Special School District and accompanying resolutions concerning consolidation that the board members of the Pulaski County Special School District were concerned primarily with the educational opportunities of all of the Pulaski County school children and were not simply focusing their interests on students within their district boundaries. (PX 20-23, 25, 35)

19. Similarly when consolidation was discussed, the North Little Rock School District Board members demonstrated their concern for the entire student population of Pulaski County. (PX 22)

20. In response to Act 21 of the 1966 Legislature, all three districts appointed members to the Pulaski County School Study Commission to study consolidation. (PX 35) This commission prepared a plan for consolidation of all three districts. (PX 35) The Pulaski County Special School District adopted the Commission's recommendations., (PX 21) The North Little Rock School District discussed this issue on December 15, 1966 and held a hearing on the proposed consolidation on January 24, 1967. While the North Little Rock School District was considering consolidation, a desegregation suit was filed against that district. Consolidation efforts ceased.

21. Because of the large numbers of formal and informal transfers of students among the districts and the abetting of the transfers by the districts, the cooperation among the districts and their personnel in other areas, the recurrent consideration of consolidation and the long-standing practices of annexations to the two city districts, the Court finds that the three school districts in Pulaski County were not historically separate and autonomous.

22. The Pulaski County Special School District was interested in consolidation with the other districts in the county and was willing to have its territory annexed to the Little Rock (and North Little Rock) School District(s) until approximately the time when the Little Rock School District adopted an essentially full-scale desegregation plan. Since that time the Pulaski County district has not been willing to consolidate with the other districts or to allow its territory to be annexed to Little Rock or to North Little Rock.

23. It was only with the increasing development of white suburban housing within the boundaries of the Pulaski County Special School District and the institution of desegregation efforts directed at the defendant districts that the defendant districts developed separate autonomous attitudes about their districts vis-a-vis the Little Rock School District. The assumption of these separate identifiable autonomous attitudes sprang from impermissible racial motives.

24. Recent informal efforts by the Little Rock School District to achieve consolidation failed.

25. The refusal of the Pulaski County Special School District, with its long history of deannexations and support of consolidation, allow this court to infer that race is a factor in its decision to energetically oppose interdistrict relief.

26. The Pulaski County Special School District's acts of freezing its boundaries to discontinue the practice of allowing city and Little Rock School District boundaries to remain coterminous springs from an unconstitutional racial motive that has significant interdistrict effects on the Little Rock School District.

Taxation and Housing

27. The Pulaski County Special School District receives substantial revenues from tax monies generated from properties located within the boundaries of the City of Little Rock. (PX 47—$4,504,073) Additionally, the county has received approximately $1,332,000 in revenue from Act 9 industrial

development bond issues let by the City of Little Rock. The Little Rock School District has received no revenues from these bond issues. (T. 547) The Pulaski County Special School District is financially dependent on its association with the City of Little Rock.

28. Public housing in Pulaski County has historically been the subject of racial segregation.

29. Ark.Stat.Ann. § 19-3004 authorizes city and county governments to operate housing authorities upon adoption of an appropriate enabling resolution. The Cities of Little Rock and North Little Rock have adopted such resolutions, but Pulaski County has never chosen to operate a housing authority. However, Ark.Stat.Ann. § 19-3003(g) permits city housing authorities (such as Little Rock and North Little Rock) to construct housing projects within ten miles of their corporate limits. Even though they possessed this power, no housing project has ever been constructed within the boundaries of the Pulaski County Special School District by either the Little Rock or North Little Rock housing authorities.

30. The development of the Granite Mountain project together with the Federal Housing Administration's development of an all black subdivision adjacent to the project serves as a good example of the manner in which blacks have been located to the south and east in Little Rock. The impact on public education in the county from the Granite Mountain development is also apparent, for once again the Little Rock School District annexed and the Pulaski County Special School District willingly "de-annexed" this area.

31. During the early 1950's, the Little Rock Housing Authority was also engaged in several clearance projects through which housing units were razed. (T. 61) Areas of central Little Rock were the subject of selective clearance (T. 62) while black projects located north and west in Little Rock and closer to predominantly white neighborhoods were the subject of complete clearance.

32. The black residents of these two clearance areas were relocated to the black housing projects in the eastern parts of the city. (T. 65-66) White families who were relocated from the central Little Rock clearance area were relocated to the west, rather than to the eastern parts of the city. (T. 142-43)

33. The relocation of blacks from the western and northern parts of the city, and from areas where black housing was found adjacent to white housing, to the eastern parts of the city was done pursuant to a deliberate policy of the Little Rock Housing Authority and other governmental bodies to maintain residential racial segregation. (T. 59-60, 70-71)

34. There were other policies designed to concentrate blacks in the eastern and central parts of the city. Up until at least the 1960's, the real estate practices of "steering" and "redlining" were common in Little Rock. (T. 74-76) Steering is the practice of real estate agents' directing potential house purchasers to certain residential areas if they were white but to other areas if they were black. Redlining is the practice of not making mortgage loans, or making only a few loans, to whites who wish to purchase homes in black areas or to blacks who wish to purchase homes in white areas. (T. 74-75) Formal redlining, in the sense of lines actually being drawn on maps, did not occur to any significant extent in Little Rock because it was not necessary; because of the relatively small size of the city and because mortgage lending officers knew which areas were supposed to be black and which were supposed to be white, the loan officer could be relied upon to perpetuate residential segregation. (T. 75-76)

35. Mr. Andrew Jeffries, a black real estate broker, violated a policy of his employer by selling a home to a black in an area which had not previously been occupied by blacks. (T. 148) This same sale also violated an Arkansas Real Estate Commission regulation which provided that "a realtor should never be instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or nationality, or any individuals whose presence will clearly be detrimental to property values in that

neighborhood." (PX 50-A, Article 34 of the Code of Ethics of the National Association of Real Estate Boards) Mr. Jeffries' sale was reported by his employer to the Arkansas Real Estate Commission whereupon he was advised that this "misconduct" might prevent him from receiving his real estate license. He did receive his license but was forced to resign his employment by his employer.

36. These housing practices, both public and private, together with the manner in which predominantly black areas were willingly transferred to the Little Rock School District from the Pulaski County Special School District contributed greatly to the disparity in the racial composition of these school districts.

37. The North Little Rock Urban Renewal and Housing Authority programs operated in a similar fashion to Little Rock's. The low-income housing projects in North Little Rock were all constructed south of Interstate 40, in the less-affluent portions of the city. The projects which were initially for white occupants, Windamere Hills and Silver City Courts, were located west of Interstate 30 and south of Interstate 40, while black projects, Hemlock and Eastgate, were located east of Interstate 30 and south of Interstate 40. (PX 4)

38. The only major clearance project in North Little Rock was a complete clearance of the Military Heights area lying south of Interstate 40 and west of Interstate 30. This project had become all black and when it was razed, blacks were moved to Little Rock as well as south and east in North Little Rock.

39. A review of the minutes of the North Little Rock School Board reflects that decisions concerning school construction and renovation were made in a manner which considered and sought to preserve the racial identification of North Little Rock neighborhoods.

40. Some tracts purchased for school construction were subject to racially restrictive covenants. (PX 51) Such purchases necessarily were more beneficial to the white patrons

of the North Little Rock School District than they were to its black patrons. Furthermore, this type of action would only serve to make the North Little Rock School District less attractive to current and prospective black residents of Pulaski County.

41. The goal of preserving residential segregation has been successful. The southern and eastern parts of the Little Rock School District remain heavily black to this day. The black population of the city has expanded to the west to some extent, but the far western portions of the city remain white today. (PX 5 and 40, p. 13) Northern and northwestern parts of the city, including the area where the black West Rock clearance area was formerly located, remain virtually all-white today. (PX 5 and 40, p. 13) Similarly in North Little Rock, the residential areas near the housing projects, that is, those lying south of Interstate 40, have become substantially black. The area north of Interstate 40 has remained overwhelmingly white. (PX 5)

42. The existence and location of the housing projects, the location of other government-subsidized housing units, the failure to build projects within the geographic boundaries of the county district, and the private and public steering and redlining practices are major contributing factors to the residential segregation in Pulaski County which exists today.

The Expert Witnesses

43. Dr. Robert Dentler, a witness for plaintiff and Professor of Urban Sociology and Education at the University of Massachusetts and former Dean of Education at Boston University, analyzed the existing status of the three districts with reference to their achievement of a unitary, desegregated system. Dr. Dentler was one of the three court appointed experts in *Liddell* v. *Board of Education of the City of St. Louis, et al*, No. 72-100C(4) (E.D. Mo.), which has been the subject of voluminous litigation in this Circuit and involves the consolidation of multiple districts in the St. Louis metropolitan area. He is widely recognized as an expert in school desegregation.

44. Dr. Dentler began with a data base which included but was not limited to the following: Student enrollments in the pertinent time period, description of facilities in each of the districts, the date facilities were constructed, types of repairs and renovations made on the facilities, the racial and ethnic composition of the student bodies of the three systems over a period of time, curricular and instructional program materials of each district, the location of housing projects and public assistance projects in Pulaski County, industrial development, and on-site visits to each of the three districts. This data base was submitted to the Court during the trial and all documents were available for inspection and cross-examination. Dentler further used demographic, educational and transportation facilities data gathered in the formal discovery process. (T. 328-30)

45. Dr. Dentler expanded his data base further by gathering substantial information from administrators at the Little Rock School District Central Office; the Director of Management Information Services of the University of Arkansas, Mr. Jim Lynch; surveys and reports published by the University of Arkansas; and plans and officials of Metroplan, a countywide metropolitan planning agency of which all three of the districts involved in the case at bar are members. (T. 331-32)

46. Another expert witness for plaintiff was Dr. Charles Willie, Professor of Education and Urban Studies at the Harvard Graduate School of Education for the past nine years. Dr. Willie previously taught at New York University and Syracuse. Dr. Willie's areas of expertise are educational sociology, educational planning, educational administration and race relations, community organization and population demography. He has published extensively in each of these areas. Of significant relevance to the instant case are "Community Organization and Educational Politics", "The Sociology of Urban Education", "Black Students at White Colleges", and "Race Ethnics, and Associated Economic Status" and a book currently in press outlining in detail the

desegregation efforts in Atlanta, Milwaukee, Boston, and Seattle. (T. 179-80; PX 14) Dr. Willie has served as a court appointed master in the Boston school desegregation case, and as an expert witness in the Denver school desegregation case for the defendant school board. He was later appointed by the court to a compliance assistance panel in Denver. He was an expert witness for the plaintiff in the Dallas school desegregation case, and an expert witness for the United States Government in the North Carolina Higher Education desegregation case. (T. 180)

47. Dr. Willie was retained for the purpose of looking at the defendants, North Little Rock School District and the Pulaski County School District, to examine the court orders to desegregate the defendant districts, and to determine whether or not the actions of the defendant districts had complied with the court orders and whether or not the failure of those districts to comply with the orders of this District Court had interdistrict effects on the Little Rock School District. (T. 186)

48. The data base for his testimony consisted of census bureau reports having to do with social and economic characteristics of the cities and county in the metropolitan area, the metropolitan data book, the data obtained from various school systems through the discovery process and from reading of the court orders and opinions. (T. 187-90)

49. The other expert witness for the Little Rock School District was Dr. Martin Shapiro of Emory University who has a Ph.D. from Indiana University and a J.D. from Emory University.

50. Dr. Shapiro has recently been involved in two school desegregation cases dealing primarily with the placement and testing of children in special educational programs and with ability tracking. (T. 1031)

51. Dr. Shapiro's assignment here was to read and analyze magnetic tapes from the federal Office of Civil Rights of the Department of Education. These contain data

gathered every year, more extensively in the even numbered years, and concern placement of children in special education programs. (T. 1031)

52. Dr. Finis Welch testified as an expert witness for the defendant Pulaski County Special School District. Dr. Welch is a professor of economics at UCLA. He also heads his own consulting firm, Welch Associates, which develops statistieal information and provides expert statistical testimony for defendants for litigation. (T. 1352)

53. The other expert witness for the defendants was Dr. J. Michael Ross. He has a Ph.D. from Harvard in Social Psychology and has taught at the University of California, Massachusetts Institute of Technology and Boston University. He has done research on school desegregation for 20 years and has served as a consultant in those fields.

54. As will appear in these findings, the Court has to a considerable extent accepted the findings and opinions of the plaintiff's experts and discounted those of defendants' experts. The former are some of the most eminent authorities in the field of school desegregation. While the latter are distinguished scholars, I am not satisfied as to the validity of many of their premises and conclusions in this case.

Status of Desegregation in the Little Rock School District

55. The Little Rock School Board, the Superintendent of Schools and the staff of the Little Rock School District have a dedicated and demonstrable commitment to the extirpation of segregation "root and branch" as evidenced by programs, policies and resource commitments. (T. 351, 1400-1403, 1427-1430)

56. The Little Rock School Board and staff are knowledgeable as to court orders mandating total integration. (T. 1321-22)

57. The Little Rock School District has complied with the directives establishing a Bi-Racial Committee for the District, as ordered by the Court. (T. 1319; PX 56) Further

efforts to achieve desegregation resulted in a bi-racial committee at each school (T. 1319, 1404) and a student bi-racial committee.

58. In an effort to remedy disparity between blacks and whites on the nationwide SRA test, the Little Rock School Board adopted a policy to develop programs and expend resources to close the gap. Some of the programs implemented by the District have been: homework centers, hotlines, a kindergarten failure program and the Carver School. (T. 1331)

59. The school district has a master learning concept which is designed to assist teachers in becoming more sensitive to the needs of minority youngsters. (T. 1401-1403) The district has developed a Free Reading program which is aimed at reducing the difference in the reading levels between black and white students; it has instituted a tutoring program; it has opened study centers in areas which are easily accessible to minority students. (T. 1403)

60. In addition to having a staff which is sensitive and responsive to the desegregation process, the Little Rock School District utilizes auxiliary units or programs to assist in the integration process. (T. 141)

61. With regard to staffing, the Little Rock School District employs a desegregation officer whose title is Assistant to the Superintendent in Charge of Desegregation. However, his responsibilities in desegregation are shared with virtually all the other staff members in the administration. (T. 1401)

62. The Little Rock School District's conscious efforts regarding desegregation are further evidenced by the number of blacks and whites the district employs. (T. 1427-30) Currently, the percentage of black staff members (teachers, principals and administrators all included) is approximately 48%. (T. 1430; PX 26)

63. Educational programs in the Little Rock School District have observable consequences for the upgrading of black student achievement and retention rates in the Little Rock school system. (T. 352)

64. Conversely, the Pulaski County School System and the North Little Rock School System have no programs of this kind to provide compensatory or supportive assistance for blacks. (T. 352)

65. Further program inequities in the North Little Rock and the Pulaski County School Districts can be demonstrated in the major difference between the program and curricular guides. In the Little Rock School District, educational opportunity for black students figures in the agenda and the business of instruction in many ways that are absent in the other two systems. (T. 352)

66. The magnet factors of relatives, jobs, and public housing units have encouraged high proportions of blacks migrating to move to the Little Rock School District. (T. 225, 226)

Status of Desegregation in the Pulaski County School District

67. The staff and Board of the Pulaski County School Board have displayed only minimal knowledge of this court's mandates in *Zinnamon* v. *Pulaski County Special School District, supra,* which may partially account for substantial noncompliance with its terms. (T. 842-49)

68. The Pulaski County Special School District does not have any programs, policies, or practices to guarantee compliance with the court's order requiring that construction site selection be racially neutral. (T. 850-51)

69. In selecting new school construction sites, the Pulaski County Special School District Board has not complied with Paragraph 4(h) of the *Zinnamon* decree which required that new school site selection and school enlargement be determined on the basis of the objective criteria set out in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1. In

fact, the Board members are unfamiliar with this specific requirement, have never seen or read a copy of *Swann* or *Zinnamon* and have never been informed of the meaning of the "racially neutral" requirement set out in *Swann*. The selection of all sites for new schools built after the entry of the *Zinnamon* decree has been made without any consideration given to the impact or effect such selection would have on desegregation and is therefore a constitutional violation. As stated repeatedly during the testimony of the various board members, race has been completely ignored in school site selection. The racial characteristics of a proposed construction site *must* be taken into account by the Board in order for it to discharge its responsibilities under the *Zinnamon* decree:

> The construction of new schools and the closing of old ones are two of the most important functions of local school authorities and also two of the most complex. They must decide questions of location and capacity in light of population growth, finances, land values, site availability, through an almost endless list of factors to be considered. The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of innercity neighborhoods.
>
> In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically

> intended for Negro or white students, school authorities have sometimes, since *Brown*, closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of 'neighborhood zoning.' Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with 'neighborhood zoning,' further lock the school system into the mold of separation of the races.

420 U.S. at 20-21.

70. The Pulaski County Special School District staff member in charge of school construction planning also testified repeatedly that race played no part in site selection. (T. 833-34, 837, 841) He had not heard of the term "racially neutral site," and knew nothing about the *Zinnamon* decree. (T. 834)

71. The building of new schools that are racially identifiable, even to the point of being in excess of 90% white, indicates that the school district is ignoring or rejecting the court orders to desegregate. (T. 229, 230; PCSSD X 9)

72. Through its power of annexation, the City of Little Rock has played an instrumental role in the site selection of new schools constructed in the Pulaski County Special School District. This has been particularly true as to Otter Creek Elementary School and Fair High School where the City has provided the necessary city services to facilitate the location of these schools in predominately white areas. This will inevitably spur more white movement out of the Little

Rock School District to the Pulaski County Special School District. (T. 1204-1208; 838-840)

73. Due to the aggressive annexation practice of the City of Little Rock, the population of the unincorporated portions of Pulaski County had decreased between 1970 and 1980 by one-half, while the white population of the Pulaski County Special School District was holding steady or even increasing. (T. 218) At the same time the white population in the North Little Rock School District and the Little Rock School District diminished. (T. 218)

74. In Pulaski County, outside the boundaries of Little Rock and North Little Rock, the per capita median income is lower, as is pupil expenditure. There was thus no economic basis for the movement to Pulaski County and it therefore was probably racially motivated. (T. 219)

75. The defendant Pulaski County Special School District's Exhibit 13 confirmed Dr. Willie's theory that the movement of whites is related to the size of the black and minority population in that school system by showing that a disproportionate number of whites were moving into the Pulaski County Special School District. (T. 223, 224)

76. Fewer employment opportunities for blacks, absence of role models in teaching and administration, deployment of students, and total absence of blacks at levels of decision making are all factors which discourage minorities from moving to Pulaski County Special School District because there is no indication that they will be treated fairly or with openness and inclusiveness. (T. 227)

77. The future plans of the City of Little Rock include carrying forth an assertive annexation plan designed to bring virtually all of Pulaski County south of the river within the limits of the city. (T. 1219-1220) The annexation and resulting availability of services in these outlying areas will provide the impetus for population growth in these areas (T. 1209), further increasing the tendency toward white flight to the suburbs. (T. 1209)

78. In developing attendance zones for the Pulaski County School District, the staff and Board did not follow the mandate of the *Zinnamon* decree. Admittedly this was difficult in view of the site selection policies. These zones were formulated without the requisite professional, legal, and expert assistance. As a result over 50% of the schools are not in compliance with paragraph 4(e) of the *Zinnamon* decree requiring black enrollment of "not less than ten or not more than twenty-five per cent." (T. 630-36; 697-724; 856-58)

79. The County Board Members were unaware of the Pulaski County Special School District's obligation to establish a Bi-Racial Committee as set out in Paragraph 4(k) of the *Zinnamon* decree, and unaware of any effort undertaken by Pulaski County Special School District to establish such a committee. (T. 585, 586, 587, 629, 689, 875-77) The absence of a bi-racial council in Pulaski County Special School District is a serious violation of the court order. (T. 216)

80. The Pulaski County Special School District Board has never complied with Paragraph 4(l) of the *Zinnamon* decree requiring that two black citizens, elected and selected by the black community, serve in an ex-officio capacity on its Board of Education. (T. 587, 588, 589, 629, 878) Ex-officio Board members who sit and participate in all deliberations, although they may not vote, are even more important than bi-racial committees. (T. 217) Failure to designate such members is also a serious violation of the court order.

81. The Pulaski County Special School District has never had a black in a top level administrative position. (T. 865-868)

82. The Pulaski County Special School District has never instituted or implemented any policy, practice, or procedure as required under the *Zinnamon* decree to encourage principals and other responsible administrators to structure curricular or extracurricular activities to insure the participation of a proportionate number of blacks. (T. 871)

83. The Pulaski County Special School District has no mechanism to monitor the percentage of blacks and whites in

the school's Talented and Gifted (TAG) program, the Educably Mentally Retarded (EMR) program, or the Learning Disabled (LD) program. (T. 871-72; 894)

84. Blacks are underrepresented in the administrative offices of the Pulaski County Special School District and also on the teaching faculty of schools in the district. (T. 203-204, 208)

85. Only 2,196 students in Pulaski County Special School District are bused for purposes of desegregation. In a district which is 23% black, 56% of the 2,196 students bused for desegregation purposes are black. (T. 346)

86. A black student enrolled in the Pulaski County Special School District System is 2½ times more likely to be bused for desegregation purposes than a white student. (T. 346)

87. Defendant's Exhibit No. 10, entitled Pulaski County School District School Enrollment from Neighborhood and Satellite Zones, together with transportation summary makes it clear that disproportionate numbers of blacks are transported and that some blacks are transported long distances just to go to a school which is already racially identifiable as black.

88. These transportation figures are not surprising when considered in light of the site selection practices of the Pulaski County Special School District.

89. It is clear that the Pulaski County Special School District maintains identifiably black schools by simply refusing to bus in whites or by busing in additional blacks. Examples of schools maintained identifiably black by busing in blacks include Wakefield, Watson and Cloverdale. (T. 346)

90. In contrast, the identifiably white schools, Baker, Bayou Meto, Cato, Oak Grove, and Fair are maintained as white schools because blacks are not bused to them. Busing is used for desegregative purposes in Pulaski County only at Harris, Mills and Fuller schools and not sufficiently in those

to bring those schools out of their identifiably black status. (T. 347)

Status of Desegregation in the North Little Rock School District

91. Blacks are underrepresented on the administrative staff and on the teaching faculties of the schools in the North Little Rock School District. (T. 1182; 191) The North Little Rock School District is required by court order to desegregate its staff so that the proportion of its staff will be similar to that of the students enrolled in the system. The percent of principals found in the North Little Rock system is 16 percentage points less than the proportion of black students. (T. 191) The faculty of the North Little Rock School District is 22% black and 78% white. Since there is a 34% to 35% minority school population, growing at ½% to 2% per year, the proportion of minority teachers is violative of the court order. (T. 191)

92. Whites are underrepresented in schools south of Interstate 40. (T. 195) Blacks are underrepresented in schools north of Interstate 40. Thus, blacks are concentrated in schools in the southern part of North Little Rock closest to Little Rock and whites are concentrated in schools in the northern part of the district.

93. The North Little Rock School District has failed to become a unitary district by its failure to have blacks at the central administration, concentrating whites in schools north of Interstate 40 while concentrating blacks in schools south of Interstate 40, its failure to have black principals and administrators at the high school level, and its failure to have blacks coaching at the senior high school level.

94. Twenty percent of the black student body is classified as mentally-retarded or as having learning disabilities. (T. 1183) This unusual statistic was analyzed by Dr. Martin Shapiro.

95. PX 27 is a voluminous set of three printouts assembled by Dr. Martin Shapiro. The first set is the actual raw data, the second set summarizes the data in terms of classroom assignments, and the third, analyzes the placement of children with respect to the Educable Mentally Retarded (EMR) and Specific Learning Disabled (SLD) categories. (T. 1033) Dr. Shapiro made findings and reports for the years 1972, 1976, 1978 and 1980. (T. 1034; PX 63)

96. The data Dr. Shapiro reviewed included the number of expulsions, corporal punishments and suspensions by race; the subject matter and grade level of each class; the number of EMR seriously emotionally disturbed, trainable mentally retarded, and SLD by race; and number of diplomas by race. (T. 1036-1038)

97. Dr. Shapiro developed a statistical methodology which allows for inferential statistical techniques, stating conclusions in terms of standard deviations. The Court approves of this methodology. (T. 1039) Shapiro's method is described fully in PX 63-H. (T. 1039) Shapiro's analysis resulted in a statistical index showing the disproportionality of blacks and whites between schools in a district and within schools. (T. 1040, 1041)

98. In each instance his analysis used standard statistical methods of standard deviations and chi squares, and their associated probabilities. (T. 1046)

99. Blacks in all three of the districts are overrepresented in special education (T. 1049), with there being a serious overrepresentation of blacks in the EMR category in North Little Rock and a very high one in the Pulaski County Special School District. (T. 1050) The results in these two systems are extreme compared to other systems which Shapiro has analyzed. (T. 1052) No valid testing procedure could end up placing one out of every four or five children in special education. (T. 1084)

100. The gifted program in North Little Rock for 1980 reflects that only 9.4% of the program was black. This is an

underrepresentation of blacks in the gifted program of 6.8 standard deviations, which would occur only seven times in a billion by chance. (T. 1062)

101. In 1980, 5.66% of blacks in the Little Rock School District were classified as retarded or learning disabled, 19.41% of blacks in North Little Rock were so classified, and 11.40% in Pulaski County Special School District were so classified. Said another way, a black student moving from the Little Rock School District to Pulaski County Special School District doubles his risk of receiving a retarded or learning disabled classification, while the risk is quadrupled if a black moves from the Little Rock School District to the North Little Rock School District. (T. 1067)

102. Analysis of Exhibit 63-G reveals that blacks are overrepresented in dropout rate and expulsions in all of the districts except in the Little Rock School District. (T. 1069)

Interdistrict Effects
Policies and Practices of the Three Districts

103. After review and investigation of each of the districts and the findings herein, a determination was made of the interdistrict effects of the racial isolation between and among the districts. The Court is in agreement with Dr. Dentler as to the following interdistrict effects:

(1) Interdistrict effects for educational programs.

(a) Black students in Little Rock and North Little Rock are denied access to the very predominantly white enrolled programs for gifted and talented students located in the Pulaski County Special School District. (T. 372)

(b) Conversely, black students in North Little Rock and the Pulaski County Special School District are denied access to the only magnet schools that operate in the County; these schools are accessible only to students in the Little Rock School District, with the single exception of the Metropolitan Vocational Technical school, which is located outside of the

Little Rock School District but is operated by it on behalf of all three districts. (T. 372)

(c) Black students in Little Rock receive strong compensatory instructional support. Little Rock School District resources and resources sought from the state and federal governments have been aimed at upgrading the learning opportunities of black students in Little Rock particularly during the last 5 years. (T. 372) Neither the North Little Rock School District nor the Pulaski County Special School District provide comparable compensatory instructional support for black students. (T. 372)

(d) Before the Supreme Court decision in *Brown* v. *Board of Education*, there were many totally segregated schools. During the next 25 years, however, schools for black students disappeared. These schools were replaced by institutions that were allegedly designed to serve students with special needs; known as exceptional schools, they were predominantly black. (T. 374) The next phase of development involved the concept of mainstreaming under which school districts were obligated to give students with special needs access to regular schooling. (T. 374) Nonetheless some districts reflect a heritage of racial discrimination by placing black students in segregated special education programs. (T. 374) In both the Pulaski County Special School District and North Little Rock School District white students are classified as students with "learning disabilities," while blacks in those districts are labeled as "mentally retarded." (T. 375)

(e) Classification of black students into one category or another for special education treatment differs according to the school district residence of the black student. (T. 373)

(f) The chances that a black student will be classified as educably mentally retarded statistically are significantly much greater in the North Little Rock School District and the Pulaski County Special School District than they are in the Little Rock School District. (T. 373)

(g) The North Little Rock and Pulaski County school districts emphasize learning disability programs which host predominantly white students, while black students in those districts are hosted in special education classes for alleged mental retardation. (T. 373)

(2) Interdistrict effects in area staffing:

(a) The three districts in Pulaski County hinder one another with respect to achieving racial and educational equity in staffing. (T. 375) Blacks have a greater chance of becoming school administrators in the Little Rock School District than they do in either the North Little Rock School District or the Pulaski County Special School District. (T. 375)

(b) The chances of a black teacher being hired are 1½ times greater in the Little Rock School District than they are in either the Pulaski County Special School District or the North Little Rock School District. (T. 376)

(3) Interdistrict effect of student distribution among the districts.

(a) The interdistrict consequences of student assignments, student transportation and facility provisions result in a situation which makes black students and their families more attracted to the Little Rock School District than to either the North Little Rock School District or the Pulaski County Special School District. (T. 377)

(4) Interdistrict effects created by all three districts operating under separate and independent court orders to desegregate.

(a) Each of these court orders to desegregate was drawn up as an occasional patch in a patchwork quilt, without regard to the consequences or implications for the other school districts in Pulaski County. (T. 377)

(b) The magnet schools in use in Little Rock are not workable on a single-district basis within a metropolitan

area. Magnet schools cannot have educational success when some students can enter and others cannot. (T. 378)

(5) The separate transportation plans and programs of the three districts have interdistrict effects.

(a) Busing designed for desegregative purposes has resulted in a greater percentage of black students being bused in the North Little Rock School District and the Pulaski County Special School District than should be expected with less than satisfactory desegregation results. (T. 379)

(6) The boundary lines themselves have interdistrict effects.

(a) The boundary lines are maintained to keep the Little Rock School District predominantly black and limit opportunites therein for black students. (T. 379)

(b) The boundaries have generated consequences with respect to difference in state aid for instructional and related services and state aid for transportation. (T. 380)

(c) While the differences which favored the county over the years were remedied in the 1983 special legislative session, the effects continue from all the years in which the state aid formula supported the county and was a disadvantage to the Little Rock School District and the North Little Rock School District. (T. 380)

(d) The boundary conditions as they exist led to a system that allows school construction to follow real estate development and not educational needs or constitutional mandates. (T. 380)

(e) The boundary lines cause the overcrowding of students, particularly black students, in some schools and produce empty seats in others. (T. 381)

104. Dr. Willie agreed with the above conclusions of Dr. Dentler that these acts impacted on the Little Rock School

District and contributed to the interdistrict effect of a disporportionate concentration of blacks in the Little Rock School District. (T. 228)

105. The disparity between the districts in the classification of black students into the special ed categories has an interdistrict effect. Blacks are discouraged from moving out of the Little Rock School District by this disparity.

III. SUMMARY

The Little Rock School District in spite of good faith efforts to comply with orders of this court and to establish a unitary school system will become a segregated all-black district in a few years if present trends continue, which appears highly likely.

The Pulaski County Special School District has failed to comply with the mandates of this court delivered in 1973 to establish a unified, integrated system. Such non-compliance by the Board and staff is so substantial that the Pulaski County district is not now operating a constitutional school system.

The North Little Rock School District has also failed to establish a unitary, integrated district for the reasons noted in the above findings and in the observations of the Court of Appeals quoted at some length, *supra*. There is minimal integration in the administrative staff and there is blatant discrimination in the classification of students into mental retardation and slow learning categories.

The deficiencies in the Pulaski County and North Little Rock districts have had severe interdistrict effects, as noted in the findings, *supra*. The only long-term or even short-term solution to these problems is consolidation. Not only will this solution provide the basis for establishment of a unitary school system, but it should provide economy in administration and transportation that will contribute toward a quality education for all students in this county. Financial support for the schools, which shows signs of waning particularly in Little Rock, can be equalized and stabilized. It is obvious

from the last school election that Little Rock whites, many of whom are educating their children in private schools, are unwilling to commit financial support to a school system rapidly becoming all black. The same trends so evident in Little Rock are now beginning to gather momentum in North Little Rock. North Little Rock now is approximately at the point where Little Rock was ten years ago in terms of black enrollment.

The collapse of support for public education would be a tragic event. It is axiomatic that a democracy cannot long exist without a system of free public schools providing a quality education. In my view public eduction in this community has reached a crisis stage. The problem cannot be avoided by equivocation or half measures. I am today ordering a consolidating of the three school districts now operating in Pulaski County. Consolidation is feasible, workable, and in the best interests of all students in Pulaski County. The precise nature of the means to accomplish such a consolidation plan will be examined at a hearing on April 30, 1984.

IV. CONCLUSIONS OF LAW

1. The court has jurisdiction of the parties and the subject matter of this action under 28 U.S.C. §§ 1331(a), 1343(3) and (4), 2201, and 2202. Plaintiff alleges that its cause of action arises under 42 U.S.C. §§ 1981, 1983, 1988 and 2000(d), and the Fourteenth Amendment of the Constitution of the United States.

2. None of the three school districts in this case has achieved unitary status. *Cf. United States* v. *Texas Education Agency*, 647 F.2d 504 (5th Cir. 1981). The Pulaski County Special School District has never applied for unitary status; the North Little Rock District and the Little Rock District have applied for but been denied unitary status. *Clark* v. *Board of Education*, 705 F.2d 265 (8th Cir. 1983); *Davis* v. *Board of Education*, 675 F.2d 684 (8th Cir. 1982).

3. The well established history of de jure segregation together with judgments and orders of the United States District Court for the Eastern District of Arkansas, place upon each of the Districts in the instant case the affirmative duty to eliminate every vestige of the state-mandated system of segregation. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Liddell* v. *State of Missouri*, — F.2d —, 8th Cir., slip opinion 2/8/84, No. 83-1957, at n. 10.

4. The history of interdistrict transfers, ignoring of boundary lines, pattern of annexations, the interdependence of all parts of the metropolitan area, the county as the basic taxing and collecting unit, the history of cooperation among the districts, and the County Board of Education's supervisory role for the three school districts demonstrate that the three districts historically had fluid boundary lines and were not meaningfully separate or autonomous. *Evans* v. *Buchanan*, 393 F.Supp. 428 (D. Del. 1975) (three-judge court).

5. The Little Rock School District has standing to bring this suit in furtherance of its affirmative duty to eliminate all vestiges of segregation root and branch, and in compliance with prior orders of this Court to provide a desegregated education for its students. *Swann* v. *Charlotte-Mecklenburg Board of Education, supra; Clark* v. *Board of Education, supra.* In addition, voluntary efforts to achieve interdistrict relief have failed.

6. The predominantly segregated residential patterns of Pulaski County have been caused in a significant degree by the actions of many governmental bodies, acting in concert with each other, with the defendants, and with private interests, and are not solely attributable to a series of individualized private housing choices. *Hills* v. *Gautreaux*, 425 U.S. 284 (1975); *Swann* v. *Charlotte-Mecklenburg Board of Education, supra.*

7. The governmental actions affecting housing patterns in Pulaski County have had a significant interdistrict effect on the schools in Pulaski County, which has resulted in the great

disparity in the racial composition of the student bodies of the Little Rock district and the two defendants districts. *Swann* v. *Charlotte-Mecklenburg Board of Education, supra.*

8. The segregative actions taken by the two defendant districts and their failure to take desegregative actions have had a significant interdistrict effect on the schools in Pulaski County, which has also contributed to the great disparity in the racial composition of the student bodies of the Little Rock district and the two defendant districts. *Swan* v. *Charlotte-Mecklenburg Board of Education, supra.*

9. The Pulaski County Special School District has committed the following purposeful acts with continuing racially segregative interdistrict effects: (a) failed to adhere to the requirements of the *Zinnamon* decree; (b) constructed schools in locations which ensured that they would be racially identifiable schools; (c) failed to apportion the burdens of transportation equally on black and white students; (d) refused to hire and promote black faculty and staff; (e) refused to allow deannexation to or consolidation with the other two districts; (f) failed to assign students to schools in such a way as to maximize desegregation; (g) assigned students to special education classifications and gifted programs on a discriminatory basis; (h) assigned black principals to schools with high black enrollments; (i) created and maintained a racial imbalance in almost half its schools; and (j) closed and downgraded schools in black neighborhoods and failed to build new schools there.

10. The North Little Rock School District has committed the following purposeful acts with continuing racially segregative interdistrict effects: (a) failed to assign blacks to its central administration or to high school principalships and coaching positions; (b) concentrated whites in schools north of Interstate 40 and blacks in schools south of it; (c) assigned students to special education classifications on a discriminatory basis; and (d) failed to apportion the burdens of transportation equally on black and white students.

11. When Pulaski County Special School District and North Little Rock School District took the purposeful acts set forth in Conclusion Nos. 9 and 10 above, they knew or should have known that they would have interdistrict segregative effects.

12. The unconstitutional and racially discriminatory acts of the Pulaski County and North Little Rock School Districts have resulted in significant and substantial interdistrict segregation. *Milliken* v. *Bradley*, 418 U.S. 744.

13. Since there are constitutional violations with interdistrict effects, an interdistrict remedy is appropriate. *Milliken* v. *Bradley, supra; Liddell* v. *State of Missouri, supra.* The remedial hearing will begin April 30, 1984.

14. The Pulaski County Board of Education and Arkansas State Board of Education are necessary parties who must be made subject to the Court's remedial order.

This 13th day of April, 1984.

/s/ Henry Woods
HENRY WOODS, U.S. District Judge

Table 8. ELEMENTARY SCHOOLS: FACILITIES, ENROLLMENTS, AND STAFF

NAME	YEAR BLT.*	CONDITION	GRADES	CAPACITY**	1962 ENRLMNT.	% UTILIZATION	BLACK ENRLMNT.	% BL.	TCHRS.	# BL. TCHRS.	# ADMRS.	# B ADM.
Little Rock												
1) Brady	'54	3	K-3	525	340	65	266	78	20.7	4.6	1	0
2) Fair Park	'29	2	K-3	325	304	94	240	79	19.1	12.1	1	1
3) Forest Park	'13	2	K-3	475	345	73	210	61	19.8	6.0	1	1
4) Fullbright	'79	1	K-3	625	480	77	369	77	25.8	6.0	1	0
5) Jefferson	'50	3	K-3	500	357	71	233	65	23.4	6.0	1	0
6) McDermott	'67	2	K-3	600	432	72	330	76	24.6	8.6	1	0
7) Meadowcliff	'56	2	K-3	500	413	83	301	73	24.2	9.5	1	0
8) Terry	'64	2	K-3	600	521	87	345	66	28.8	5.0	1	0
9) Woodruff	'11	1	K-3	325	258	79	189	73	17.4	5.4	1	0
10) Bale	'59	3	K-3	500	330	67	226	68	19.9	7.8	1	1
11) Carver	'24	3	K-6	480	495	104	495	100	27.7	15.0	1	1
12) Ish	'64	2	K-6	400	397	99	397	100	24.3	8.0	1	0
13) Mitchell	'08	2	K-6	275	396	144	396	100	23.6	8.8	1	0
14) King	'37	2	K-6	300	377	126	299	79	22.1	8.0	1	1
15) Rightsell	'06	3	K-6	400	348	87	323	93	21.6	10.0	1	0
16) Romine	'61	2	K-6	650	659	101	492	75	32.5	17.5	1	0
17) Western Hls.	'66	3	K-6	225	315	140	151	48	16.0	5.0	1	0
18) Williams	'58	2	K-6	550	452	82	212	47	28.4	11.0	1	1
19) Wilson	'27	2	K-6	500	470	94	275	59	26.3	9.0	1	0
Total				8,755	7,689	88%	5,749	75%	446.2	163.3	19	6

* Dates of additions to base plant not shown.

** Portable classrooms *not* included in capacity count.

Table 8. ELEMENTARY SCHOOLS: FACILITIES, ENROLLMENTS, AND STAFF—(cont'd.)

NAME	YEAR BLT.	CONDITION	GRADES	CAPACITY	1982 ENRLMNT.	% UTILIZATION	BLACK ENRLMNT.	% BL.	# TCHRS.	# BL. TCHRS.	# ADMRS.	# B ADM.
Little Rock Intermediate Elementary Schools												
20) Booker	'63	2	4-6	645	411	64	342	83	20.5	10.5	1	1
21) Franklin	'49	3	4-6	550	465	85	347	75	22.5	7.0	1	0
22) Garland	'22	3	4-6	380	384	101	318	83	20.0	14.5	1	0
23) Gibbs	'53	3	4-6	375	419	111	364	87	22.0	13.5	1	1
24) Pulaski Hts.	'25	3	4-6	500	427	85	263	62	21.5	6.0	1	0
25) Rockefeller	'79	1	4-6	500	402	80	288	72	23.5	9.5	1	0
26) Stephens	'50	2	4-6	425	341	80	233	68	18.5	8.5	1	0
27) Washington	'50	3	4-6	375	307	82	217	71	17.5	8.5	1	0
Total:				3,750	3,156	84%	2,372	75%	166.0	78.0	8	3

Table 8. ELEMENTARY SCHOOLS: FACILITIES, ENROLLMENTS, AND STAFF—(cont'd.)

NAME	YEAR BLT	CONDITION	GRADES	CAPACITY	1982 ENRLMNT	% UTILIZATION	BLACK ENRLMNT	% BL	# TCHRS	# BL. TCHRS	# ADMRS	# B ADM.
North Little Rock												
28) Amboy			K-6	370	288	78	67	23	24.5	5.0	1	0
29) Argenta			K-6	400	224	56	71	32	19.5	5.0	1	0
30) Belwood			K-6	250	153	61	31	20	15.5	3.0	1	0
31) Boone Pk.			K-6	565	565	100	222	39	34.5	9.5	1	0
32) Crestwood			K-6	300	211	70	87	41	18.5	3.5	1	0
33) Glenview			K-6	300	185	62	95	51	18.5	3.0	1	0
34) Indian Hls.			K-6	470	434	92	92	21	27.0	6.5	1	0
35) Lakewood			K-6	500	268	54	107	40	20.0	6.0	1	1
36) Levy			K-6	600	229	38	82	36	16.0	5.0	1	0
37) Lynch Dr.			K-6	400	345	86	130	38	26.0	5.5	1	0
38) Meadow Pk.			K-6	300	268	89	109	41	20.0	4.0	1	0
39) No. Heights			K-6	500	434	87	156	36	23.5	7.0	1	0
40) Park Hill			K-6	550	241	44	90	37	22.0	3.5	1	0
41) Pike View			K-6	350	334	90	86	26	26.0	4.5	1	0
42) Pine			K-6	400	265	66	136	51	19.5	4.5	1	0
43) Redwood			K-6	550	232	42	112	48	19.0	6.5	1	1
44) Rose City			K-6	650	285	44	70	25	23.0	4.5	1	0
45) Seventh St.			K-6	450	372	83	164	44	25.5	5.5	1	0
Total:				7,905	5,333	67%	1,907	36%	398.5	92.0	18	2

• Data not directly available. Estimated from 1954-1980 record of enrollments, using highest year, rounded.

•• Data not directly available on kindergarten students. Also, district does not distinguish black from other minority students in records. Estimates made by interpolating from two reports.

Table 8. ELEMENTARY SCHOOLS: FACILITIES, ENROLLMENTS, AND STAFF—(cont'd.)

NAME	YEAR BLT	CONDITION	GRADES	CAPACITY	1982 ENRLMNT	% UTILIZATION	BLACK ENRLMNT	% BL	# TCHRS	# BL TCHRS	# ADMRS	# B ADM
Pulaski County												
46) Adkins	'63	3	K-6	300	347	116	113	33	15.0	0.0	1	0
47) Arnold	NA	NA	K-6	500	491	98	93	19	18.0	4.0	1	0
48) Badgett	'63	2	K-6	350	352	101	185	53	16.0	5.0	1	0
49) Baker	'59	2	K-6	300	280	93	4	1	13.0	6.0	1	0
50) Baseline	'75	2	K-6	500	583	117	285	49	27.0	5.0	1	0
51) Bayou Meto	'67	3	K-6	400	615	154	10	2	21.0	3.0	1	0
52) Cato	'74	2	K-6	600	606	101	15	3	28.0	6.0	1	0
53) Chicot	'75	2	K-6	650	661	102	215	32	28.0	6.0	1	0
54) Cloverdale	'80	3	K-6	500	572	114	192	36	25.0	4.0	1	0
55) Coll. Stn.	'59	2	K	375	116	31	93	80	6.5	2.0	1	1
56) Cook	'54	2	K	350	223	64	122	55	13.5	4.5	1	1
57) Dodd	'61	2	K-6	375	340	91	91	27	15.0	3.0	1	0
58) Dupree	'59	2	K-6	450	454	101	69	15	18.0	4.0	1	0
59) Fuller	'59	2	K-6	400	485	121	167	34	21.0	5.0	1	0
60) Geyer Spr.	'59	2	K-6	200	222	111	75	34	10.0	1.0	1	0
61) Harris	'55	2	K-6	1,125	600	53	203	34	27.5	7.0	1	1
62) Jacksnvle	'63	2	K-6	775	734	95	162	22	30.0	6.0	1	0
63) Landmark	'59	2	K-6	450	517	115	125	24	21.0	5.0	1	0
64) Lawson	'57	3	K-6	350	386	110	4	1	19.5	4.5	1	0
65) Mabelvale	'58	2	K-6	550	601	109	141	22	26.0	5.0	1	0
66) Oakbrooke	'80	1	K-6	500	491	98	92	19	22.0	5.0	1	0
67) Oak Grove	'71	2	K-6	725	565	78	59	10	23.0	5.0	1	0
68) Otter Creek	'79	1	K-6	500	444	89	70	16	20.0	4.0	1	0
69) Pine Forest	'80	1	K-6	500	528	106	62	12	23.0	4.0	1	0

Table 8. ELEMENTARY SCHOOLS: FACILITIES, ENROLLMENTS, AND STAFF—(cont'd.)

NAME	YEAR BLT	CONDITION	GRADES	CAPACITY	1982 ENRLMNT.	% UTILIZATION	BLACK ENRLMNT.	% BL.	# TCHRS	# BL. TCHRS.	# ADMRS.	# B ADM.
70) Pinewood	74	2	K-6	500	547	109	128	23	23.0	8.0	1	1
71) Robinson	74	2	K-6	500	477	95	94	20	20.0	5.0	1	0
72) Scott	30	1	K-8	325	214	41	98	46	18.5	4.0	1	0
73) Sherwood	60	2	K-6	610	674	110	150	22	27.0	6.0	1	0
74) Sylvan Hls.	63	2	K-6	750	780	104	121	16	33.5	6.5	1	0
75) Taylor	80	1	K-6	500	463	93	110	24	20.0	4.0	1	0
76) Tolleson	NA	NA	K-6	700	585	83	91	16	23.5	5.0	1	1
77) Wakefield	59	3	K-6	575	512	89	170	33	20.0	6.0	1	1
78) Watson	67	2	K-6	600	560	93	234	42	27.0	5.0	1	0
Total:				16,985	16,028	94%	3,843	24%	702.5	149.5	33	6

Table 9. JUNIOR HIGH SCHOOLS: FACILITIES, ENROLLMENTS, AND STAFF

NAME	YEAR BLT	CONDITION	GRADES	CAPACITY	1982 ENRLMNT	% UTILIZATION	BLACK ENRLMNT	% BL	# TCHRS	# EL. TCHRS	# ADMRS	# S ADM
Little Rock												
79) Dunbar	'29	2	7-9	870	692	80	375	54	35.0	18.5	3	2
80) Forest Hts	'56	3	7-9	725	769	106	502	65	40.0	17.0	3	1
81) Henderson	'64	2	7-9	955	862	90	494	57	50.0	14.0	3	1
82) Mann	'55	3	7-9	661	654	99	501	77	39.5	19.5	3	2
83) Pulaski Hts	'21	2	7-9	700	600	86	360	60	34.0	9.0	3	1
84) Southwest	'56	3	7-9	765	710	93	467	66	38.0	15.5	3	1
Total				4,676	4,287	92%	2,699	63%	236.5	93.5	18	8
North Little Rock												
85) Central	NA	NA	7	1,000	812	81	231	28	54.0	9.5	2	0
86) Lakewood	NA	NA	7-9	800	523	65	157	30	38.0	4.5	2	0
87) Ridgeroad	NA	NA	7-9	1,000	645	65	206	32	37.5	6.0	1	1
88) Rose City	NA	NA	8-9	400	433	108	164	38	32.5	7.0	2	0
Total				3,200	2,413	75%	758	31%	162.0	27.0	7	1
Pulaski County												
89) Cloverdale	'58	3	7-9	747	840	112	235	28	41.5	6.0	2	0
90) Fuller	'53	2	7-9	722	485	67	167	34	52.5	16.0	3	1
91) Jksnvle/No	'55	3	7-9	946	594	63	149	25	32.5	8.0	2	1
92) Jksnvle/So	'53	2	7-9	896	570	64	154	27	32.5	7.0	2	1
93) Mabelvale	'53	2	7-9	847	611	72	39	6	31.0	5.5	2	0
94) Northwood	'79	1	7-9	1,000	976	98	59	6	47.5	7.0	3	

Table 9. JUNIOR HIGH SCHOOLS: FACILITIES, ENROLLMENTS, AND STAFF—(cont'd.)

NAME	YEAR BLT	CONDITION	GRADES	CAPACITY	1982 ENRLMNT	% UTILIZATION	BLACK ENRLMNT	% BL	# TCHRS	# BL TCHRS	# ADMRS	# B ADM
95) Robinson*	'54	3	6-8	772	477	62	94	20	24.5	5.5	2	1
96) Sylvan Hls	'56	2	7-9	971	949	98	105	11	47.5	9.5	3	1
Total				6,901	5,302	80%	1,002	18%	309.5	64.5	19	6

*Middle school

Table 10. SENIOR HIGH SCHOOLS: FACILITIES, ENROLLMENTS, AND STAFF

NAME	YEAR BLT.	CONDITION	GRADES	CAPACITY	1982 ENRLMNT	% UTILIZATION	BLACK ENRLMNT	% BL.	# TCHRS	# BL. TCHRS	# ADMRS	# B ADM.
Little Rock												
97) Central	'26	1	10-12	1,909	1,989	104	1,106	56	94.5	31.0	5	3
98) Hall	'57	3	10-12	1,180	1,084	92	594	55	61.5	20.0	5	3
99) Parkview	'68	2	10-12	1,038	1,208	116	762	63	67.0	17.0	4	2
Total:				4,127	4,281	104%	2,462	58%	223.0	68.0	14	8
North Little Rock												
100) Northeast	'70	2	10-12	1,400	1,050	75	284	27	66.5	10.5	3	1
101) Ole Main	'34	2	10-12	2,000	1,083	54	393	36	69.5	11.5	3	1
Total:				3,400	2,133	63%	677	32%	136.0	22.0	5	2
Pulaski County												
102) Fair	'81	1	7-12	850	832	98	97	12	48.5	10.5	3	1
103) Jacksnvle.	'69	3	10-12	1,220	1,181	97	331	28	55.5	5.0	3	0
104) McClellan	'65	3	10-12	1,494	1,472	102	268	18	70.0	11.0	4	1
105) Mills	'69	3	10-12	946	1,020	108	409	40	50.0	11.0	2	0
106) Oak Grove	'62	3	7-12	672	825	123	119	14	43.0	6.0	3	1
107) N. Pulaski	'76	2	10-12	1,121	726	65	41	6	36.0	6.0	2	1
108) Robinson	'54	3	9-12	772	459	59	53	11	31.0	7.0	2	1
109) Sylvan Hls.	'56	3	10-12	896	864	96	119	14	43.0	7.0	2	1
Total:				7,921	7,379	93%	1,437	19%	377.0	63.5	21	6

Nos. 85-1316, 85-1547

Supreme Court, U.S.
FILED
MAY 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PULASKI COUNTY SPECIAL SCHOOL DISTRICT NO. 1, *et al.*,
and ARKANSAS STATE BOARD OF EDUCATION, *et al.*,

Petitioners,

VS.

LITTLE ROCK SCHOOL DISTRICT, *et al.*
and LORENE JOSHUA, *et al.*,

Respondents.

CONSOLIDATED BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1) Did the Court of Appeals for the Eighth Circuit properly determine that the district court's findings of segregative violations with significant interdistrict effect were not clearly erroneous?

2) Did the Court of Appeals apply the relevant case law in a manner which is consistent with its own precedent and in harmony with the law of other circuits?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-1316

No. 85-1547

PULASKI COUNTY SPECIAL SCHOOL DISTRICT NO. 1, et al., and ARKANSAS STATE BOARD OF EDUCATION, et al.,

Petitioners,

vs.

LITTLE ROCK SCHOOL DISTRICT, et al. and LORENE JOSHUA, et al.,

Respondents.

CONSOLIDATED BRIEF IN OPPOSITION

JURISDICTION

The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that "[no State shall] deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This interdistrict school desegregation case follows on the heels of efforts to desegregate the Little Rock, Arkansas school district, reported in Aaron v. Cooper and Clark v. Little Rock Board of Education.[1] The plaintiffs are the Little

[1] Aaron v. Cooper, 143 F. Supp. 855 (E.D. Ark. 1956); aff'd 243 F.2d 361 (8th Cir. 1957); Aaron v. Cooper, 2 Race Rel. L. Rep. 934-36, 938-41 (E.D. Ark. 1957), aff'd Thomason v. Cooper, 254 F.2d 808 (8th Cir. 1958); Aaron v. Cooper, 156 F. Supp. 220 (E.D. Ark. 1957), aff'd sub nom. Faubus v. United States, 254 F.2d 797 (8th Cir. 1958); Aaron v. Cooper, 163 F.Supp. 13 (E.D. Ark.), rev'd 257 F.2d 33 (8th Cir.), aff'd sub nom. Cooper v. Aaron, 358 U.S. 1 (1958); Aaron v. Cooper, 261 F.2d 97 (8th Cir. 1958); Aaron v. Cooper, 169 F. Supp. 325 (E.D. Ark. 1959); Aaron v. McKinley, 173 F. Supp. 944 (E.D. Ark. 1959), aff'd sub nom. Faubus v. Aaron, 371 U.S. 197 (1959); Aaron v. Tucker, 186

Rock School District and intervenors Joshua and Knight, et al.[2] The defendants are the Pulaski County Special School District No. 1 (hereinafter PCSSD), the North Little Rock School District (hereinafter NLRSD), and the Arkansas State Board of Education (hereinafter SBE or State Board).[3]

F.Supp. 913 (E. D. Ark. 1960), rev'd Norwood v. Tucker, 287 F.2d 798 (8th Cir. 1961); Clark v. Board of Education of Little Rock, 369 F.2d 661 (8th Cir. 1966); Clark v. Board of Education of Little Rock School Dist., 426 F.2d 1035 (8th Cir. 1970), cert. denied 402 U.S. 952 (1971); Clark v. Board of Education of Little Rock School District, 449 F.2d 493 (8th Cir. 1971), cert. denied 405 U.S. 936 (1971); Clark v. Board of Education of Little Rock School District, 465 F.2d 1044 (8th Cir. 1972), cert. denied 413 U.S. 923 (1973); Clark v. Board of Education of the Little Rock School District, 705 F.2d 265 (8th Cir. 1983).

[2] Knight and Joshua were allowed to intervene at the remedy stage by an Eighth Circuit order reversing the district court's denial of intervention. Joshua, et al. v. Pulaski County Special School District No. 1, et al., 738 F.2d 445 (8th Cir. 1984).

[3] The PCSSD and NLRSD each were the subject of a school desegregation suit. The PCSSD

There are three school districts in Pulaski County: LRSD, PCSSD and NLRSD.[4] LRSD covers 53 square miles and comprises 60% of the City of Little Rock. The population of the area covered by LRSD is 2/3 white; during the 1983-84 school year 70% of LRSD's 19,052 students were black. NLRSD covers 26 square miles and comprises nearly all of the City of North Little Rock. In 1983-84, 36% of NLRSD's 9,051 students were black; 64% were white. PCSSD was created in 1927 and surrounds LRSD and NLRSD. PCSSD covers 755 square miles and contains the portion of the

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litigation, Zinnamon v. Board of Education of the Pulaski County, Arkansas Special School District, No 1, LR-68-C-154, filed in 1968 was settled in 1973. The NLRSD litigation, Davis v. North Little Rock School Board, was last before this Court in 1981 on the school board's petition for certiorari, which was denied. 635 F.2d 730 (8th Cir. 1980), cert. denied 454 U.S. 904 (1981).

[4] Each of the three districts is under court order to desegregate; none has achieved unitary status.

county which is not in LRSD and NLRSD. In 1983-84 PCSSD enrolled 27,839 students, of whom 22% were black and 78% were white.

The State Board's Liability

Prior to 1954 the State of Arkansas mandated segregation in public schools. Ark. Stat. Ann. § 80-509. As they were throughout Arkansas, the black public schools in Pulaski County, i.e., within LRSD, PCSSD and NLRSD, were inferior to the white schools. Moreover, the black ele-mentary schools in PCSSD and NLRSD were inferior to black elementary schools in LRSD, and disparities on the high school level were even more pronounced. Prior to 1954, PCSSD maintained inadequate black schools and operated without an accredited high school for black students. Accordingly, the LRSD was identified as the school district with opportunities for black students, who were drawn there from all over the state and particularly from

other parts of Pulaski County. Some black families moved from the County to Little Rock because of disparities in educational opportunities.

The State of Arkansas was aware of these inequities and their consequences. The state took no remedial action to require adequate facilities outside of LRSD for black students prior to 1954. In fact, when it came to educating black students the State ignored school district boundary lines. Arkansas took no post-Brown steps to dismantle its segregated school systems or to improve the quality of black schools. Post-1954 state actions heightened the identity of the LRSD as a black district and delayed desegregation. Although the LRSD had announced shortly after Brown I that it would begin to desegregate its schools by 1957 and complete the process by 1963, the active intervention of the state was a

central factor in delaying desegregation of the Little Rock schools until 1973, and in contributing to an increasing concentration of blacks in LRSD.

The state took no action to foster racially neutral school siting; it approved segregative siting as late as 1980. In 1953 the state enacted legislation authorizing the segregative transfer of a housing project site, Granite Mountain, specifically designated for blacks, from PCSSD to LRSD. This transfer further identified the LRSD as the school district in Pulaski County with primary responsibility for educating blacks. The State of Arkansas has never acknowledged its affirmative duty to assist local school boards in their desegregation efforts and has never promulgated any rules or guidelines which

would encourage local school districts to eliminate discrimination within their school systems.

PCSSD's Liability

PCSSD participated in and was liable for the pre-1954 violations ascribed to the State Board, and shares responsibility for the manner in which the dual interdistrict system of education concentrated blacks in LRSD. The courts below ruled that PCSSD committed a number of post-Brown segregative actions which had significant interdistrict effects. PCSSD accepted students from LRSD when the latter closed its schools during the 1958 school year to avoid desegregation. Significant numbers of interdistrict transfers continued until the mid-1960's.

The historic intention was that the boundaries of the cities of North Little Rock and Little Rock would remain coterminous with their respective school

districts. Until the late 1960's as the City of Little Rock grew, LRSD grew. After Green v. County School Board, 391 U.S. 430 (1968) made school desegregation more likely, LRSD no longer annexed land so as to remain coterminous with the city of Little Rock.

By 1984 the City of Little Rock encompassed 91 square miles while LRSD covered 53 square miles. Areas annexed to the City of Little Rock but part of PCSSD are residential areas in which many white families lived or moved. As a result, their children now attend PCSSD schools. If the boundaries of the City of Little Rock and its school district had remained coterminous the black-white ratio in LRSD schools would now be sixty-forty rather than seventy-thirty. The courts below found that PCSSD's acts of freezing its boundaries to discontinue the practice of allowing the City of Little Rock and LRSD

boundaries to remain coterminous spring from unconstitutional racial motives that have significant interdistrict effects on LRSD.

The 1973 Zinnamon decree set forth PCSSD's desegregation responsibilities. PCSSD has not complied with the terms of the decree in a number of significant respects. PCSSD failed to meet goals for hiring and promotion of black principals, teachers and administrators. After 1973 PCSSD closed schools in black neighborhoods and built new schools in distant white neighborhoods. Many of the new schools were over 90% white. There has been no new construction in black areas of the county. The Eighth Circuit affirmed the district court's conclusion that PCSSD's violation of the Zinnamon order directing the district to stop building

schools in a segregative manner has had substantial and continuing intra-and inter-district effects.

The chances that a black student in PCSSD will be classified as mentally retarded are significantly greater in PCSSD than in LRSD. The burdens of transportation fall inequitably on black PCSSD students. Student assignments continue to be made on a discriminatory basis. In 1983 PCSSD bused black students to black schools rather than to available white schools. Of fifty-one schools in PCSSD, sixteen were racially identifiable as black schools and thirteen were racially identifiable as white schools. The Eighth Circuit ruled that PCSSD's failure to comply with requirements of the Zinnamon decree which would have provided input of the PCSSD black community on school sites selection and housing project decisions exacerbated the historical trend

of black in-migration to LRSD and white out-migration to PCSSD. The district court further concluded that PCSSD and LRSD boundaries have been maintained to keep LRSD predominantly black and PCSSD predominantly white and that these manipulations and other violations had substantial interdistrict effect. The Eighth Circuit ruled that these findings were not clearly erroneous.

The Court of Appeals Decision

On appeal, the Eighth Circuit held that the district court's findings on liability were not clearly erroneous and that intra- and inter-district relief was appropriate. The Court of Appeals ruled that the district court's conclusion that consolidation was the only viable remedy was clearly erroneous and remanded remedial issues for further hearings on school district boundary line adjustments or some other effective alternative which

would remedy the proven violations. The court ordered additional relief, including improving the quality of education in any remaining all-black schools in LRSD, provision of compensatory and remedial programs for black children in all three school districts, magnet schools and programs, and the State Board's participation in funding remedial and quality education programs.

REASONS FOR DENYING THE WRIT

PCSSD and the State's petitions for a writ of certiorari should be denied. Two courts below concluded that the evidence established that defendants' segregative violations have had significant interdistrict effect. The Eighth Circuit correctly ruled that the district court's findings in this regard were not clearly erroneous and thus, under Anderson v. City of Bessemer, 84 L.Ed.2d 518 (1985) and Pullman-Standard v. Swint, 456 U.S. 273,

276-90 (1982), cannot be reversed. The district court made specific findings on interdistrict effects of the actions of PCSSD and the other defendants; these findings were scrutinized by the Eighth Circuit which ruled that they were not clearly erroneous.

The Eighth Circuit order to revise the boundaries between PCSSD and LRSD is predicated on a close review of all of the evidence before it. The Eighth Circuit modified the district court's remedial order and provided for a less intrusive remedy with respect to district boundary lines, which is tailored to address the effects of specific violation found. Moreover, PCSSD's certiorari petition presents issues to this Court which arguably are not ripe for adjudication. The Eighth Circuit's order directs the district court to hold a hearing before adjusting the boundaries between PCSSD and

LRSD. The nature and scope of the remedy cannot be determined until that hearing is held.[5]

The State's liability as "a primary constitutional violator" is well established. Under the relevant Eighth Circuit precedent and in harmony with the applicable law of other circuits the district court's remedy, as modified, is necessary and appropriate.

Milliken v. Bradley, 418 U.S. 717 (1974) establishes the conditions under which a district court may order interdistrict relief. The Eighth Circuit, sitting en banc, applied Milliken's standards in a manner consistent with its own precedent and with the law of other circuits. "Before the boundaries of separate and autonomous districts can be

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[5] As of the submission of this brief that hearing has not been held. The appellate court's order leaves open the possibility that no boundary adjustments will be made.

set aside" there must be proof of "racially discriminatory acts" within one district that produce a "significant segregative effect" in another district. 418 U.S. at 744-45. The Eighth Circuit upheld numerous factual findings by the district court which fell within the parameters of the proof required by Milliken. The appellate court found that the district court's findings on liability were not clearly erroneous.

1. In its petition for certiorari, PCSSD ignores crucial grounds for the Court of Appeals affirmance of the district court's liability findings and miscasts the nature of other findings. The Eighth Circuit opinion delineates a number of violations committed by PCSSD before and after Brown I. The former include PCSSD's failure, coupled with the State's, to provide adequate education for black students even during the de jure period.

The court of appeals noted that"[o]f particular importance to this case [was the fact that] the black elementary schools in [PCSSD] were inferior to the black elementary schools in LRSD." A-13. With the "even more pronounced" disparities at the high school level and PCSSD's failure even as of the mid-1950's to provide a fully accredited high school for black students, these violations identified LRSD "as the district in the state which provided educational opportunities for black students." Id. The Court of Appeals stated that "[t]his identification tended to draw black students to LRSD from all over the state, and particularly from Pulaski County." The two courts below both credited state-commissioned studies concluding that disparities between educational opportunities in school districts "were prominent among the factors that drew black families to Little

Rock from the county and the rest of the state." A13-14. The Eighth Circuit cited the district court:

> It cannot seriously be denied that the Little Rock School District's maintenance of the only North Central accredited high school in the County and indeed in the entire area led to a concentration of blacks in this district. For almost half a century it has not only assumed the burden of giving a quality education to blacks in the County and from far corners of the state but has also been the object of racially motivated attacks by certain political and cultural groups. 514 F. Supp. 330.

This finding alone, which the Court of Appeals ruled was not clearly erroneous, establishes an unconstitutional segregative interdistrict violation on the part of PCSSD and the State Board (through the State) which created their affirmative duty to dismantle the dual system "root and branch". Green v. County School Board, 391 U.S. 430 at 437-38 (1968). That duty remains unsatisfied.

Two courts below found that PCSSD involvement with segregative interdistrict transfers in the late 1950's and early 1960's were part of a scheme in which local and state school board officials ignored school district boundary lines in order to maintain segregation. The appellate court, after reviewing the record in its entirety, concluded that "[t]he district court's finding that specific discriminatory actions by the defendants had a substantial and continuing effect on the racial composition of LRSD is supported by general and school population statistics."[6] A-23. This Court

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[6] The court of appeals cited demographic data "generally contrary to statewide trends in Arkansas [which tended] to support plaintiffs' theory that state-created racial turmoil in LRSD in the 1950's fostered substantial white flight from LRSD to PCSSD and NLRSD. A-23, n.8. This scenario falls directly within the parameters of Milliken's requirement of proof of "racially discriminatory acts" within one district that produce and "significant segregative effect" in another district". 418 U.S. at 744-45.

has stated that a reviewing court cannot substitute its interpretation of the evidence to reach a different factual finding if there is any reading of the evidence which supports the district court. Anderson v. City of Bessemer, 84 L.Ed.2d 518 at 528 (1985); Pullman Standard v. Swint, 456 U.S. 273, 287-90 (1982). Two courts below reviewed the evidence and reached the same conclusion; petitioner PCSSD's dissatisfaction with that reading does not justify denying deference to the fact finding court.

2. PCSSD asserts that its failure to comply with its intradistrict desegregation decree (Zinnamon) has no interdistrict effects and that the court of appeals did not find these derelictions to be intentional. The Zinnamon decree specifically requires PCSSD to take certain actions and avoid others. PCSSD

cannot legitimately claim that flagrant violations of the decree are unintentional. The decree enjoined discriminatory construction plans; nonethless the courts below found that PCSSD violated that provision of Zinnamon and Swann's admonition against the location of new schools "in the area of white suburban expansion, farthest from the Negro population center." Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 at 20-21 (1971). Having been made aware of its responsibilities by court order, PCSSD cannot argue that its subsequent failure to comply was not intentional discrimination. "Adherence to a particular policy or practice, 'with full knowledge of the predictable effects of such adherence on racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent

should be drawn.'" Columbus Board of Education v. Penick, 443 U.S. 449, 465 (1979). Moreover, two courts below concluded that "there were substantial and continuing inter- and intra-district effects from PCSSD's violation of Zinnamon's specific order that PCSSD must cease and desist now and in the future from building schools in sites which are not equally accessible to blacks and whites." A-31, 584 F. Supp. at 346.

PCSSD asserts that "there are no factual findings (and no evidence in the record) to establish any casual connection between ... intradistrict violations and the increasing proportion of black students in the Little Rock School District". PCSSD Petition at 10. PCSSD blithely ignores, by way of example, evidence such as that cited by the court of appeals.

> The district court credited the testimony of Dr. Charles Willie, Professor of Education and Urban Studies at the Harvard Graduate School of Education, that the various intentionally discriminatory actions of the defendant outlined in this opinion contributed to the disproportionate movement of whites into PCSSD instead of LRSD. 584 F. Supp. at 347. He testified that, among other factors ... PCSSD's numerous violations of the Zinnamon decree (including school site locations) were of significance.

A-45-46.

Petitioner PCSSD attempts to wish away the evidence and then assert that the district court's findings, affirmed by the court of appeals, have no support in the record.

3. PCSSD concedes that "the findings and evidence clearly demonstrated the existence of segregatory location of housing projects within the City of Little Rock," but contends that the only housing decision with interdistrict effects was the Granite Mountain housing project.

PCSSD Petition at 11. The evidence shows that the state concentrated public housing in LRSD, even though the Little Rock and North Little Rock housing authorities had authority to construct housing ten miles beyond city limits, i.e., in PCSSD. As for PCSSD's claim that "there was no finding, and no evidence that the failure to build public housing in the county was the result of any racially discriminatory purpose on the part of the housing authorities themselves or of any person, private or official, in the suburban areas" (PCSSD Petition at 11), the Court of Appeals noted that "[t]he district court found that [segregative clearance and relocation practices] were part of 'a deliberate policy of the Little Rock Housing Authority and other governmental bodies to maintain a residential racial segregation.'" A-37, 584 F. Supp. at 342. "PCSSD also contributed to the segregated

nature of the private housing market through its decisions in school sitings." A-37. The Court of Appeals quoted Chief Justice Burger in Swann: "People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the pattern of residential development of a metropolitan area and have important impact on the composition of inner city neighborhoods." 402 U.S. 1 at 20.[7] Again, petitioner PCSSD's distortion of the nature of the record below does not justify review by this Court.

4. Petitioner PCSSD argues that no factual support exists for a finding of "freezing" or "manipulation" of school district boundaries. The Court of Appeals

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[7] The Court of Appeals cited two specific fact findings in the district court's opinion, Findings of Fact 36 and 37, which leave no doubt about the interdistrict nature of the segregative housing violation. See A-38.

ruled that the district court's findings that boundaries between PCSSD and LRSD had been maintained to keep LRSD predominantly black and PCSSD predominantly white and that these boundary manipulations have had a substantial interdistrict segregative effect were not clearly erroneous.[8] A-28.

The conclusions of the court below are not in conflict with the law in other circuits. Goldsboro City Bd. of Ed. v. Wayne City, Bd. of Ed., 745 F.2d 324 (4th Cir. 1984) involved a school district which had been declared unitary and which was not tainted by violations of prior

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[8] The court cited the expert testimony of Dr. Robert Dentler, who concluded that in 1968 PCSSD and LRSD ceased consolidation efforts. Findings of Fact Nos. 7-26 in the district court opinion support the general finding that discriminatory racial intent infected consolidation decisions. The district court concluded that "[t]he refusal of the Pulaski County Special School District, with its long history of deannexation and support of consolidation, allow this court to infer that race is a factor in its decision to energetically oppose interdistrict relief." A-111.

court orders or the segregative action of housing market actors. Similarly, Lee v. Lee County Bd. of Education, 639 F.2d 1243 (5th Cir. 1981) does not dictate a different result. In Lee the Fifth Circuit ruled that the district court's finding that the interdistrict violations were neither significant nor continuing was not clearly erroneous. Here the district court decided otherwise and that finding has been upheld because it is not clearly erroneous. Thus, there is no conflict with Lee. The Eighth Circuit's conclusions do not, contrary to PCSSD's claim, require a school district to remedy mere racial imbalance between adjacent school districts. To the contrary, they are supported by factual findings which require an appropriate remedy.

5. The court of appeals' imposition of remedial responsibilities upon the state which will require an expenditure of funds

follows the law of the Eighth Circuit and does not conflict with that of others. In Milliken II, 433 U.S. 267 (1977) this Court acknowledged that remedying the effects of state-imposed segregation may require an incidental expenditure of funds for compensatory and remedial programs. In the St. Louis school desegregation suit the Eighth Circuit ordered the state of Missouri to pay one-half the cost of the construction or rehabilitation necessary to house a magnet school program and the full cost of transporting students who enrolled. See Liddell v. State of Missouri, 731 F.2d 1291 at 1309-12 (1984).[9] These remedial responsibilities imposed

[9] As the court of appeals correctly observed, the imposition of such responsibilities upon the state in Liddell was based upon an intra-district violation. Thus, this remedial element does not require proof of inter-district violation and could be ordered upon proof of a much less extensive violation than that found here.

upon the state do not conflict with the law of other circuits; they raise no issues worthy of review by this Court. See Evans v. Buchanan, 582 F.2d 750 (3rd Cir. 1978)(en banc).

The State Board argues that the requisite causal relationships between the violation and present conditions in LRSD does not exist. The State Board ignores its status as a "primary constitutional wrongdoer" whose actions had significant interdistrict effects. Moreover, the State's segregative actions through local housing authorities further impose the responsibility to eliminate the inter-district effects of its violation.

CONCLUSION

For the reasons stated above, the petitions for certiorari should be denied.

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No. 85-1316 and No. 85-1547

In the

Supreme Court of the United States

October Term, 1985

PULASKI COUNTY SPECIAL SCHOOL DIST., NO. 1, ET AL., ... *PETITIONERS*

v. No. 85-1316

LITTLE ROCK SCHOOL DISTRICT, ET AL., ... *RESPONDENTS*

ARKANSAS STATE BOARD OF EDUCATION, ET AL., ... *PETITIONERS*

V. No. 85-1547

LITTLE ROCK SCHOOL DISTRICT, ET AL., ... *RESPONDENTS*

RESPONSE TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the factual findings of a district court in a school desegregation case will be given the same weight and be subject to the same standards of review as will factual findings of trial courts in other types of cases.

2. Whether a district court may find racial motivation in a sudden hardening of school district boundary lines from circumstantial and other indirect evidence, including a forty-year history of cooperation in boundary changes.

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RESPONSE TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

This response is submitted to two petitions for certiorari, those filed by the Pulaski County School District and its members (hereafter "PCSSD" or "County District"), No. 85-1316, and by the Arkansas State Board of Education and its members ("State Board"), No. 85-1547. Respondent Little Rock School District ("LRSD") accepts for the most part the statement of facts in the petition filed by the PCSSD. There are

a few points omitted from PCSSD's statement, however, and in a few instances that statement misstates or misrepresents the facts of the case. This statement will seek to supply those omissions and rectify those errors.

The PCSSD was created in 1927 as a result of a special state legislative act allowing consolidation of a number of small school districts in Pulaski County outside the cities of Little Rock and North Little Rock. The two cities had their own school districts. As the two cities expanded over the years, their respective school districts also expanded. The Pulaski County Board of Education (the "County Board"), a governmental agency distinct from the PCSSD but also a defendant in this case, is the body which must approve transfers of territory between school districts. It did in fact approve many such transfers from PCSSD to LRSD and to the North Little Rock School District ("NLRSD") over a period of decades. The County Board recognized the historical basis for the existence of the PCSSD as that of serving students outside the Cities of Little Rock and North Little Rock in 1944, in a formal resolution stating that the PCSSD should embrace only that territory located outside the two cities. All parties—the County Board and the three school districts—acted in accordance with this principle from 1927 to 1968. The two city districts grew as the cities themselves grew, not in absolutely precise lockstep, but in very nearly identical spurts. The County District shrank correspondingly, giving up territory willingly to the city districts for some forty years.

After 1968, however, during a time of substantial growth of the cities themselves (especially the City of Little Rock), this process stopped abruptly. The result is that today about forty per cent of the City of Little Rock lies outside LRSD and remains in the PCSSD. Some seven or eight thousand students live in this area, and thus attend PCSSD schools even though they are residents of the City of Little Rock.

LRSD differs with PCSSD's statements concerning the status of desegregation in the PCSSD itself. PCSSD does not

utilize busing for desegregation purposes to any great extent, and the result is that a large number of its schools remain racially identifiable. PCSSD Appendix, A-31, A-125. [All references to an Appendix will be to the Appendix to PCSSD's Petition for a Writ of Certiorari, and will be indicated simply by the page designation "A-____".] The faculty and staff of the PCSSD are likewise not yet desegregated in many respects. A-32. PCSSD thus has not achieved "desegregation at all levels," as it states that it has.

Finally, the PCSSD carefully omits any mention that the uncontradicted evidence shows that whites who move to the Pulaski County metropolitan area tend to move in disproportionate numbers to the PCSSD, and specifically to the areas served by new, identifiably-white schools recently constructed by the PCSSD. A-123. PCSSD's own expert witness acknowledged this pattern of movement. Those identifiably-white schools have been built since the entry of the 1973 decree in PCSSD's desegregation case, *Zinnamon v. Bd. of Ed. of Pulaski County School Dist.*, No. LR-68-C-154 (E.D. Ark. 1973), and in violation of the school-siting provisions of that decree. A-30, A-31.

REASONS WHY THE WRITS SHOULD NOT BE GRANTED

There is no reason why either of these two petitions for certiorari should be granted, and there are three reasons why they should not. First, the plaintiff LRSD amply met the standards set by this Court in the seminal interdistrict school desegregation case, *Milliken v. Bradley*, 418 U.S 718 (1974) (hereafter "Milliken"), for a plaintiff who seeks an interdistrict remedy. Second, both petitioners have ignored recent decisions by this Court which unequivocally support the rulings of the courts below. Third, there is no conflict among the circuit courts of appeals in the area of interdistrict school desegregation law, despite the claims made by the petitioners to the contrary.

I. THE PLAINTIFF MET THE STANDARDS SET FORTH IN THE MILLIKEN CASE WHICH JUSTIFY INTER-DISTRICT RELIEF.

To begin with the *Milliken* decision itself, that case sets forth three distinct grounds on which interdistrict relief could be based in desegregation cases. Each of these three grounds is alone a sufficient basis for interdistrict relief. Each is present in this case. The three *Milliken* predictates for interdistrict relief are that such relief is warranted (a) where actions of the state or its constituent agencies and officials have caused significant interdistrict segregation; (b) where actions of one or more school districts have caused significant interdistrict segregation; or (c) where boundary lines between districts have been drawn on the basis of race. 418 U.S. at 745.

Under *Milliken*, the actions and omissions of a state, standing alone, can provide the basis for interdistrict relief. This point is wholly overlooked by the petitioning PCSSD. There are numerous actions of the State of Arkansas and its officials and its constituent agencies in the present case which were found by the district court to have contributed significantly to the interdistrict segregation now found in Pulaski County. Many of them, including the deliberately segregative actions of the Governor of the State, are detailed in the opinion of the Court of Appeals, at A-10 through A-24. Others include the acts and omissions of the City of Little Rock, the City of North Little Rock, Pulaski County, the Arkansas Real Estate Commission, and the Little Rock Housing Authority, all creatures of the State, which combined to provide a substantial amount of black-occupied public housing within the LRSD but none in the PCSSD. A-112 through A-114.

PCSSD's petition misrepresents the findings and the evidence regarding the several housing-related constitutional violations. It claims that no interdistrict effects arose from those violations. However, the evidence

is uncontradicted that public housing acts as a magnet factor for blacks. The fact that no public housing was ever built in the PCSSD, although there was ample statutory authority for doing so and although there is a large amount of public housing in the LRSD, means that this magnet factor draws black families into the LRSD and not into the PCSSD. The district court so found. A-114. Yet, in the face of these findings, the PCSSD says or implies that there is no interdistrict effect attributable to the location of public housing.

Where states' actions and omissions are as numerous and pervasive as those found in the present case, they would warrant substantial interdistrict relief, even if standing alone. The respondent LRSD need not and does not rely on the acts and omissions of the State of Arkansas alone to support the interdistrict remedy ordered below, since there are concurrent and extensive violations on the part of the PCSSD causing interdistrict effects. However, since *Milliken* clearly states that the actions of a state *or* of local school districts, which have an interdistrict segregative effect, can give rise to an interdistrict remedy, it is somewhat disingenuous of the PCSSD to ignore this entire alternative rationale for interdistrict relief.

The second *Milliken* predicate for an interdistrict remedy is that such a remedy is proper where actions and omissions of school districts themselves produce interdistrict segregation. There are extensive factual findings on the issues of PCSSD's constitutional violations and resulting interdistrict segregation. Two courts have recited them at length, but some of them will be listed again: PCSSD has built new schools in locations which serve to promote racial separation (A-30, A-32, A-122); its busing practices further exacerbate the racial identification of its schools (A-31, A-125); it buses a disproportionately large number of black students (A-31); it has hired and promoted too few black staff members (A-32, A-125); it discriminates

against black students in its special education program (A-32, A-127, A-128); it has closed schools in black neighborhoods (A-30); and it has egregiously failed to follow the terms of its court-approved desegregation plan (A-30 through A-32, A-120, A-124). All these violations have been found to have interdistrict segregative effects.

The PCSSD once more misrepresents the evidence and the lower courts' findings in regard to its having placed new school buildings in areas of white population distant from the black community, in violation of its own desegregation decree and of this Court's mandate in *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971). There is ample and uncontradicted evidence that these new schools were built in areas of white expansion and that they were kept white through the PCSSD's student-assignment practices. PCSSD's own expert witness acknowledged that whites moving into the overall metropolitan area tended to migrate toward these new schools.

The evidence is in fact virtually overwhelming as to the segregative, interdistrict effect of the PCSSD's site-selection practices. This is not a case which deals solely with demographic trends, occurring in a vacuum, unrelated to the acts of governmental bodies; this is a case of widespread constitutional violations committed by several governmental actors. All PCSSD's acts were found by the two lower courts to have contributed to today's segregated conditions in Pulaski County.

The third basis for interdistrict relief is that it is appropriate where district boundaries have deliberately been drawn on the basis of race. In Pulaski County, there was a tradition of LRSD expansion and PCSSD deannexation as the City of Little Rock expanded. That practice stopped abruptly after 1968. There have been conflicting explanations as to the reasons for the cessation of LRSD expansion, but the district court resolved that conflict by finding that the PCSSD's "acts of freezing its boundaries to

discontinue the practice of allowing city and Little Rock School District boundaries to remain coterminous springs from an unconstitutional racial motive." A-111[1] Thus we have in this case, instead of a drawing of boundary lines because of race, a failure to redraw boundary lines because of race. The third of the *Milliken* grounds for interdistrict relief has therefore been established. In sum, all of the three separate methods which *Milliken* sets forth as warranting interdistrict relief are present in this case.

II. CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE LOWER COURT'S RULING IS ENTIRELY CONSISTENT WITH THIS COURT'S RECENT DECISIONS.

The second reason why certiorari should not be granted is that the petitioners' arguments fly in the face of recent rulings of this Court. The petitioners completely ignore three such holdings. The most obvious instance of their avoiding mention of Supreme Court rulings is, as shown above, the manner in which the alternative *Milliken* bases for relief are systematically overlooked.

The second set of Supreme Court decisions which the petitioners disregard relates to their utter failure to recognize the role of a trial court as the finder of facts. This Court has recently emphasized the importance of this function, particularly in civil rights cases, recognizing the importance of the trial court's role in making complex factual determinations. *Anderson v. City of Bessemer City*, 105 S.Ct. 1504 (1985); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982) (hereafter "Swint"). The petitioners never mention either of these decisions. Instead, they quarrel at

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1 Since PCSSD admits that boundary-freezing would justify interdistrict relief, it argues with the lower courts' findings on this issue. Its arguments are discussed more fully below, in connection with the appropriate role of the district court in making factual determinations.

length with the district court's (and the appellate court's affirmance of the district court's) findings that there were significant countywide, interdistrict effects flowing from the numerous constitutional violations, but they never acknowledge that those findings are factual ones. They imply that factual findings such as these are not really factual findings at all, but have somehow become transmuted into questions of law. Such questions will usually be difficult ones, but they remain questions of fact. *Columbus Bd. of Ed. v. Penick*, 443 U.S. 449, 470-471 (Stewart, J., concurring). The petitioners' position on issues like these is rather like that of the Fifth Circuit before this Court's decision in *Swint*, *supra*; they would like for questions of this type to be called "ultimate" questions of fact and to be subjected to some lesser standard of review than "subsidiary" or "primary" questions. They do not make that argument squarely, of course, because it is squarely foreclosed by *Swint*, but that is exactly what their argument means.

PCSSD argues that it was not guilty of refusing to allow the decades-old process of transfer of territory from PCSSD to LRSD to continue. If any district lines have been drawn or maintained on the basis of race, an interdistrict remedy is appropriate, as PCSSD admits. *Milliken*, 418 U.S. at 744-45. While grudgingly acknowledging that the district court found that race was a motivating factor in this hardening of the boundaries, and that this fact finding was approved by the Court of Appeals, PCSSD argues that there are no underlying facts upon which the district court could make this finding.

PCSSD asks this Court to look only at whether or not there had been a petition for deannexation since 1968. This argument is not only politically naive, but it ignores the evidence before the trial court and the facts from which inferences are drawn. All who have served on public bodies and most of those who have not recognize that political decisions are made in private meetings, executive sessions,

and exchanges between governmental entities. The actual petition for governmental action is often a mere formality for decisions already made. The puzzle of why the PCSSD suddenly hardened its boundaries was carefully focused in the district court at the trial of this case, and the court found that race was a motivating factor.

From its inception in 1927, the newly-created PCSSD was intended to include all the area in Pulaski County that lay outside the Cities of North Little Rock or Little Rock, and the boundaries of LRSD and NLRSD were to remain coterminous with their respective cities. This historic intention was reiterated in the statements found in a 1944 resolution of the Pulaski County Board of Education:

> It is, therefore, by the Board ordered that all of Pulaski County, outside the territory embraced in the cities of Little Rock and North Little Rock, be created and organized into a special school district to be named and known as Pulaski County Special School District.

From its creation until 1968, the PCSSD participated and cooperated in a practice of allowing both the NLRSD and LRSD to expand their boundaries as city boundaries expanded, to remain coterminous. On the north side of the river, this intention was exemplified by the PCSSD's concurrence in NLRSD's use of "natural attendance zones." These were areas of new residential housing bordering the NLRSD. Students living in these areas were allowed to attend the NLRSD without tuition or any formal transfer procedure. This practice continued until the late 1960's. Further evidence of PCSSD's cooperation in maintaining coterminous boundaries was NLRSD's placing its Northeast Junior/Senior High complex on land which was actually physically located within the PCSSD boundaries at the time construction was begun.

Coupled with the legislative intent and pattern of cooperation in allowing the school districts on both sides of

the river to be coterminous with their cities was PCSSD's long-standing policy of advocating consolidation of the districts. Two major efforts to consolidate the districts took place in 1960 and 1967. In the midst of consolidation discussions, desegregation suits were filed against NLRSD and LRSD. Almost instantly the PCSSD froze its boundaries. Since that time, the PCSSD has not been willing to consolidate with the other two districts or to allow its territory to be annexed to either. As time passed and the student body of the LRSD became increasingly black, the PCSSD became more adamant about freezing its boundaries.

The district court found that this freezing of the boundaries came only after the institution of desegregation efforts directed toward the school districts. It further found that the boundary-freezing not only sprang from unconstitutional racial motives, but has significant interdistrict effects on the LRSD. A-111.

Additional evidence underpinning the district court's finding of interdistrict effects came from the actions of other governmental bodies which worked in concert with the PCSSD. Among them were the willingness of the City of Little Rock to allow the PCSSD's tax base to develop at the expense of the LRSD. Most importantly, the court found that Little Rock cooperated with the PCSSD in expanding its city limits and extending city services to new PCSSD school sites, thereby assisting the PCSSD in siting new schools in violation of its desegregation decree. A-122, A-123. Thus new schools sprang up, areas of white suburban housing grew around them, and the city limits expanded to take them all in, but the boundaries of the LRSD did not grow.

PCSSD has received substantial tax advantages, having interdistrict effects on the LRSD, from agreements reached between the PCSSD and the City of Little Rock for PCSSD to receive payment from industries in lieu of taxes,

in connection with issuance of industrial revenue bonds. These agreements between the City of Little Rock and the PCSSD were totally volitional, not mandated by any statute. During this same period, the LRSD had no similar arrangements and received no funds whatever from agreements with the City of Little Rock. A-111, A-112.

The district court's findings of racial motive and inter-district effects were thus based upon the history of maintaining coterminous boundaries, the timing of the abrupt change in the practice, the record of governments acting in concert at the expense of the LRSD, the general attitude of the PCSSD as reflected by its actions and its minutes, and the PCSSD's abandonment of a policy advocating consolidation of all of the districts. To suggest that the findings must be based only on the simple fact of whether or not a formal petition for deannexation was filed, without an examination of the possible explanations, is not only politically naive; it ignores the entire record of forces at play in a community. The district court conducted a sensitive inquiry into such circumstantial and direct evidence of intent as was available. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). That intent, stemming from impermissible racial motives, was found, based upon all of the evidence.

It is the duty of a district court to choose between differing possible sets of facts which offer an explanation of situations such as suddenly-frozen boundaries, *Anderson v. City of Bessemer City, supra*, and this district court did so. It found as a fact that the PCSSD chose to freeze its boundaries for racial reasons. The Court of Appeals upheld that determination. A-28. PCSSD now attacks this finding, but does so without admitting that it is a finding of fact, without mentioning *Swint* or *Bessemer City*, and without any reference to the clearly erroneous standard of review.

The third, and probably the major, omission from the two petitions for certiorari is their complete failure to

discuss this Court's decisions in *Dayton Bd. of Ed. v. Brinkman*, 443 U.S. 526 (1979) (*Dayton II*) and *Columbus Bd. of Ed. v. Penick*, 443 U.S. 449 (1979). It is not surprising that they avoid mention of these two decisions, since the approach they take to the present case was explicitly rejected in the two cases.

When numerous and extensive violations have been shown in a school desegregation case, as is the case here, a central issue for decision becomes one of how to assess the present effects of constitutional violations; i.e., how much of a current segregative effect those violations have caused. One possible analytical approach is that each violation must be separately and discretely reviewed in isolation, with the effects of that particular violation traced out in minute detail, presumably through the researches and testimony of social scientists from many disciplines, and then a remedy declared which will rectify that narrowly-defined effect. This process is then repeated: another violation is separately identified, its effects are distinctly and discretely measured out in isolation, using the same sorts of methods, and a remedy is determined for that violation. The process is repeated again and again.

The *Milliken* decision, heavily emphasized by both petitioners, does not tell us how one is to approach the violation-and-effect analysis. *Dayton II* and *Columbus* fill in that gap. The petitioners' exact argument was made in those two cases, and this Court rejected it. The school district defendants in *Dayton* and *Columbus* had argued against broad-based desegregation remedies and for the precision-of-measurement type of analysis described above. In *Dayton II*, this Court said:

> Finally, [the school districts] contend that the District Court correctly interpreted our earlier decision in this litigation as requiring respondents to prove with respect to each individual act of discrimination precisely what effect it has had on current patterns of

> segregation. *This argument results from a misunderstanding of Dayton I* [433 U.S. 406 (1977)] . . .

Dayton II, 433 U.S. at 540 (emphasis added). That same misunderstanding forms the basis for the petitioners' claims now.

Using the analysis prescribed in *Dayton II* and *Columbus*, both lower courts found interdistrict violations and substantial interdistrict effects in the present case. When such effects are shown, an interdistrict remedy is called for. *Milliken*, p. 745. Neither of the lower courts adopted the artifically segmented approach urged upon this Court by the petitioners in *Dayton* and *Columbus* and by the petitioners here. As the Sixth Circuit said:

> *Dayton* [I] does not . . . require each of fifty segregative practices or episodes to be judged solely on *its* separate impact on the system. The question posed concerns the impact of the total amount of segregation found—after each separate practice or episode has added its "increment" to the whole. It was not just the last wave which breached the dike and caused the flood.

Penick v. Columbus Bd. of Ed., 583 F.2d 787, 814 (6th Cir. 1978) (emphasis in original).

The State Board makes the same contention as the PCSSD in asking to have each violation looked at in isolation, and then adds its own separate twist to the argument, since many violations of which the State is guilty result from its failure to act. The State of Arkansas, as a *de jure* segregation state, is of course obligated to act affirmatively to eliminate all remnants of segregation. *Keyes v. School Dist. No. 1, Denver, Col.*, 413 U.S. 189 (1973). Arkansas statutes give the State Board wide-ranging powers to review or supervise many aspects of school districts' operations. A-11, n. 4; A-158, A-159. That Board has never acknowledged its affirmative duty to desegregate at any time in this litigation. Rather, it makes an almost-

incredible argument about its powers: it says it has never "interpreted" Arkansas state statutes, which admittedly give it apparently "wide-ranging supervisory power" over local schools' affairs, to give it such power in fact. State Board petition, p. 10. [2] This argument can only mean that, because the Board has never chosen even to try to use the powers it appears to hold under state statutes, it should be relieved of any responsibility for desegregating Arkansas' schools and should be exonerated from any liability in this case. These numerous sins of omission, when coupled with the equally numerous sins of commission (e.g., the role of the housing authorities, which are creatures of the state, in concentrating black families in the LRSD), were all part of the flood of violations. The State Board, like the PCSSD, would have this Court look only at the last wave over the dike.

The lower courts in the present case correctly refused to follow an approach this Court had already rejected. That refusal is the only real complaint the petitioners have with the lower courts' decisions, and that is the only basis for their seeking certiorari.

III. THERE IS NO SIGNIFICANT CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL IN THE FIELD OF INTERDISTRICT REMEDIES FOR SCHOOL SEGREGATION.

There is no basis for granting certiorari because of some alleged conflict among the Circuit Courts of Appeal.

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2 LRSD notes that the State Board has apparently, although belatedly, recognized that it does indeed possess the powers it appears on paper to possess but that it has never exercised. In responses to interrogatories received by the LRSD in April, 1986, the State Board states that it is in the process of adopting regulations which will help achieve desegregation within local school districts. If it has the power to adopt such regulations now, which the LRSD agrees that it has, why did it not have such power ten, fifteen or twenty years ago, when it had substantially identical regulatory authority by statute?

The petitioners would have this Court believe that the decision below is contrary to holdings of the Fourth and Fifth Circuits in *Goldsboro City Bd. of Ed. v. Wayne County Bd. of Ed.*, 745 F.2d 324 (4th Cir. 1984), and *Lee v. Lee County Bd. of Ed.*, 629 F.2d 1243 (5th Cir. 1981), and contrary to the decision in *Armour v. Nix*, No. 16708, slip op. (N.D. Ga. 9/24/79), aff'd 446 U.S. 930 (1980). There is no such inconsistency. *Goldsboro* and *Lee County* were both cases where the district court had found no significant interdistrict effects, basing their decisions on the conflicting evidence before them. Both courts of appeals properly accepted the trial courts' findings, as they were required to do under *Bessemer City, supra*, and *Swint, supra*. The Eighth Circuit did the same in the present case: the trial court found that there were significant interdistrict effects, and the appellate court upheld that finding.

Armour v. Nix was not a decision by this Court on the merits of a case, but was instead a summary affirmance of a decision by a three-judge district court. The trial court there had made detailed factual findings, just as the trial court did here. The findings there were that no school district boundaries had been drawn or maintained on the basis of race, that all the school districts involved were either unitary or were being operated in accordance with a court-approved desegregation plan, that there were no interdistrict segregative effects arising from the few violations found, and that there was no evidence of school district cooperation with other governmental bodies to maintain racially-identifiable schools. Those findings were presumably accurate on the basis of the evidence before that court. None of those facts is true of the present case. It is indeed correct to say that there should be no interdistrict remedy where there are no interdistrict effects, no boundaries maintained on the basis of race, and no cooperative effort to maintain racially-identifiable schools, and where school districts are in full compliance with their desegregation decrees. It is quite another to say, as PCSSD apparently does, that there can be no interdistrict remedy where there are findings to the contrary.

Another principle ignored by both petitioners, and another difference between the present case and *Goldsboro* and *Armour*, is the duty shouldered by *de jure* school systems to eliminate all remnants of segregation from their former dual school systems. All three of these school districts are former *de jure* systems and all three are judicially-determined constitutional violators. None has reached unitary status; NLRSD has actually sought and been denied a judicial determination of unitariness. PCSSD, far from being unitary, has in fact been operating in violation of its desegregation order. PCSSD's arguments about the discriminatory purpose, or lack of discriminatory purpose, underlying some act or omission carry little weight when offered by a non-unitary, former *de jure* school district which stands in violation of its own desegregation decree. They are reminiscent of the defenses put forward by the school districts and found wanting in *Green v. New Kent County*, 391 U.S. 430 (1968), and its companion cases.

CONCLUSION

The petitions for certiorari ignore major principles of school desegregation and civil rights law which have recently been enunciated by this Court, and they make arguments grounded in reasoning recently rejected by the Court. They argue disputed questions of fact without acknowledging that they are questions of fact, and the State Board makes a rather tortuous argument about the meaning of Arkansas state statutes. There is no reason presented in either petition why a writ of certiorari should be granted.

Respectfully submitted,

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